

THIS BOOK CONTAINS THE OFFICIAL  
REPORTS OF CASES

DECIDED BETWEEN

MAY 31, 2013 and DECEMBER 12, 2013

IN THE

Supreme Court of Nebraska

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NEBRASKA REPORTS  
VOLUME CCLXXXVI

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PEGGY POLACEK  
OFFICIAL REPORTER

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PUBLISHED BY  
THE STATE OF NEBRASKA  
LINCOLN  
2016

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BY PEGGY POLACEK, REPORTER OF THE SUPREME COURT  
AND THE COURT OF APPEALS

For the benefit of the State of Nebraska

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SUPREME COURT  
DURING THE PERIOD OF THESE REPORTS

MICHAEL G. HEAVICAN, Chief Justice  
JOHN F. WRIGHT, Associate Justice  
WILLIAM M. CONNOLLY, Associate Justice  
KENNETH C. STEPHAN, Associate Justice  
MICHAEL M. MCCORMACK, Associate Justice  
LINDSEY MILLER-LERMAN, Associate Justice  
WILLIAM B. CASSEL, Associate Justice

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COURT OF APPEALS  
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge  
JOHN F. IRWIN, Associate Judge  
RICHARD D. SIEVERS, Associate Judge<sup>1</sup>  
FRANKIE J. MOORE, Associate Judge  
MICHAEL W. PIRTLE, Associate Judge  
FRANCIE C. RIEDMANN, Associate Judge  
RIKO E. BISHOP, Associate Judge<sup>2</sup>

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PEGGY POLACEK ..... Reporter  
LANET ASMUSSEN ..... Clerk  
JANICE WALKER ..... State Court Administrator

<sup>1</sup>Until May 31, 2013

<sup>2</sup>As of August 20, 2013

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First .....	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund Daniel E. Bryan, Jr. Vicky L. Johnson	Beatrice Auburn Wilber
Second .....	Cass, Otoe, and Sarpy	William B. Zastera David K. Arterburn Max Kelch Jeffrey J. Funke	Papillion Papillion Papillion Plattsmouth
Third .....	Lancaster	Paul D. Merritt, Jr. Karen B. Flowers Steven D. Burns John A. Colborn Jodi Nelson Robert R. Otte Andrew R. Jacobsen Stephanie F. Stacy	Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln
Fourth .....	Douglas	Joseph S. Troia Gary B. Randall J. Michael Coffey W. Mark Ashford Peter C. Bataillon Gregory M. Schatz J Russell Derr James T. Gleason Thomas A. Otepka Marlon A. Polk W. Russell Bowie III Leigh Ann Retelsdorf Timothy P. Burns Duane C. Dougherty Kimberly Miller Pankonin Shelly R. Stratman	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha

## JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Countries in District	Judges in District	City
Fifth .....	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke ..... Alan G. Gless ..... Michael J. Owens ..... Mary C. Gilbride .....	Columbus Seward Aurora Wahoo
Sixth .....	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	John E. Samson ..... Geoffrey C. Hall ..... Paul J. Vaughan .....	Blair Fremont Dakota City
Seventh .....	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	James G. Kube ..... Mark A. Johnson .....	Madison Madison
Eighth .....	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Mark D. Kozisek ..... Karin L. Noakes .....	Ainsworth St. Paul
Ninth .....	Buffalo and Hall	John P. Icenogle ..... James D. Livingston ..... Teresa K. Luther ..... William T. Wright .....	Kearney Grand Island Grand Island Kearney
Tenth .....	Adams, Franklin, Harlan, Kearney, PHELPS, and Webster	Stephen R. Illingworth ..... Terri S. Harder .....	Hastings Minden
Eleventh .....	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Donald E. Rowlands ..... James E. Doyle IV ..... David Urbom ..... Richard A. Birch .....	North Platte Lexington McCook North Platte
Twelfth .....	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Randall L. Lippstreu ..... Leo Dobrovlny ..... Derek C. Weiner ..... Travis P. O'Gorman .....	Gering Gering Sidney Alliance

## JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First .....	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman ..... J. Patrick McArdle ..... Steven B. Timm .....	Falls City Wilber Beatrice
Second .....	Cass, Otoe, and Sarpy	Robert C. Wester ..... John F. Steinheider ..... Todd J. Hutton ..... Jeffrey J. Funke .....	Papillion Nebraska City Papillion Papillion
Third .....	Lancaster	James L. Foster ..... Gale Pokorny ..... Laurie Yardley ..... Susan I. Strong ..... Timothy C. Phillips ..... Thomas W. Fox ..... Matthew L. Acton .....	Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln
Fourth .....	Douglas	Edna Atkins ..... Lawrence E. Barrett ..... Joseph P. Caniglia ..... Marcena M. Hendrix ..... Darryl R. Lowe ..... John E. Huber ..... Jeffrey Marcuzzo ..... Craig Q. McDermott ..... Susan Bazis ..... Marcela A. Keim ..... Sheryl L. Lohaus ..... Thomas K. Harmon .....	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth .....	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Frank J. Skorupa ..... Patrick R. McDermott ..... Linda S. Caster Senff ..... C. Jo Petersen ..... Stephen R.W. Twiss .....	Columbus David City Aurora Seward Central City

## JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth .....	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	C. Matthew Samuelson Kurt Rager Douglas L. Luebe Kenneth Vampola	Blair Dakota City Hartington Fremont
Seventh .....	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Donna F. Taylor Ross A. Stoffer Michael L. Long	Madison Pierce Madison
Eighth .....	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Alan L. Brodbeck James J. Orr Tami K. Schendt	O'Neill Valentine Broken Bow
Ninth .....	Buffalo and Hall	Philip M. Martin, Jr. Gerald R. Jorgensen, Jr. Graten D. Beavers Arthur S. Wetzel	Grand Island Kearney Kearney Grand Island
Tenth .....	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Robert A. Ide Michael Offner Michael P. Burns	Holdrege Hastings Hastings
Eleventh .....	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent D. Turnbull Edward D. Steenburg Anne Paine Michael E. Piccolo Jeffrey M. Wightman	North Platte Ogallala McCook North Platte Lexington
Twelfth .....	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	James M. Worden Randin Roland Russell W. Harford Kristen D. Mickey Paul G. Wess	Gering Sidney Chadron Gering Alliance

# SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson Elizabeth Crnkovich Wadie Thomas Christopher Kelly Vernon Daniels	Omaha Omaha Omaha Omaha Omaha
Lancaster	Toni G. Thorson Linda S. Porter Roger J. Heideman Reggie L. Ryder	Lincoln Lincoln Lincoln Lincoln
Sarpy	Lawrence D. Gendler Robert B. O'Neal	Papillion Papillion

# WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
James R. Coe Laureen K. Van Norman J. Michael Fitzgerald Michael K. High John R. Hoffert Thomas E. Stine Daniel R. Fridrich	Omaha Lincoln Lincoln Lincoln Lincoln Omaha Omaha

ATTORNEYS  
Admitted Since the Publication of Volume 285

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DIANE INEZ AMDOR  
DOUGLAS JEFFREY AMEN  
ZACHARY WALLACE ANDERSON  
ASHER RYAN BALL  
EMILY ANNE BEAMIS  
LIA CHARLENE BIES  
MEGAN LYNN BISCHOFF  
KAITLYNN LACEY BOONE  
MEGHAN MARY BOTHE  
DAVID AARON BRESSEL  
KELLEN BROOKS BUBACH  
ADAM PATRICK BUHRMAN  
BEAU BRYAN BUMP  
THOMAS JOSEPH BUNTING  
NATHAN TODD BURKMAN  
NICHOLAS TODD BUSSEY  
DALLIN BRANDT CALL  
MARK RYAN CARLSON  
HEATHER ANN CARVER  
CHRISTOPHER C. CASSIDAY  
ALEXANDRA KATHERINE  
CASSIDY  
CHRISTOPHER SHANE CATTAN  
SARAH ELIZABETH CAVANAGH  
JOHN J. CAVANAUGH  
KELLI CERAULO  
MEGHAN LOIS CHAFFEE  
MISTY ROSE CHRISTO  
CHRISTINE ANNE CIMINO  
KYLE JAMES CITTA  
ANTHONY JAMES CLOWE  
PATRICK SCHAEFER COHOON  
MEGAN ELIZABETH COLLINS

JENNIFER NOEL CONNER  
BRIAN WILLIAM COPLEY  
BRIAN DAVID CRAIG  
JEFFREY ALEXANDER CRAIG  
RYAN DAVID CWACH  
SALLIE VANETTE DIETRICH  
JUSTINE DIGERONIMO  
RYAN EUGENE DIRKS  
JOEL RYAN DONAHUE  
SIOBHAN EILEEN DUFFY  
BRETT ELIZABETH EBERT  
JAMES M. EDIGER  
DEREK MICHAEL EILANDER  
JOSHUA MARK ERLANDSON  
SHANNON ELIZABETH FALLON  
KATHERINE FITZGERALD  
JANELLE MARIE FOLTZ  
CATHERINE ELIZABETH FRENCH  
GREGORY SEAN FRIEND  
LIZANN KELLY FRIEND  
JOEL JAMES FULTON  
JONATHAN DAVID GARDNER  
KATHARINE LINDSAY  
GATEWOOD  
MARGARET DEBORAH GIBSON  
RICHARD STEPHEN GIVENS  
ARIANNA CORRINE GOLDSTEIN  
BREE ASHLEY GORYNSKI  
ERICA NAKAHARA GOVEN  
LAURA J. GRACE  
GREGORY LEE GRATTAN  
STEPHANIE ELLENA GREWE  
THOMAS JOSEPH GROSS

KYLE J. GROTELUSCHEN  
MICHAEL JOSEPH GUY  
KYLE THOMAS HAMPTON  
ANDREW D. HANQUIST  
MATTHEW VERNON HANSEN  
KIMBERLY HARE  
JAMIE MARIE HARWOOD  
CHEREE MARIE HATFIELD  
ANN OSANNA HAYDEN  
LUKE PATRICK HENDERSON  
ROBERT BURK HENDERSON  
JOHN VOYLE HODGE  
LUKAS M. HOLOUBEK  
JUSTIN R. HUBER  
TERRENCE WAYNE  
HUNTINGTON, JR.  
JAMIE MARIE HURST  
CECELIA CATHERINE IBSON  
SCOTT JON IDLEMAN  
JENNY LEA JACOBSEN  
CAITLYN JAMES  
ALAN NORTON JENSEN  
XIANGYUAN JIANG  
DAIN JORDAN JOHNSON  
JOSHUA JOHNSON  
LAUREL DIANE LYNN JOHNSON  
ADAM JOSEPH KAVAN  
KENJI JOHN KAWA  
CAROLINE ELISE KEATING  
COLLIN MARK KESSNER  
MATTHEW JAMES KIERNAN  
AMY ELLIS KLOCKE  
JUSTIN J. KNIGHT  
PHILIP J. KOSLOSKE  
ALEXIS DOSHA KRAMER  
PATRICK JOHN KREBS  
ADAM BLAKE KUENNING  
JACK WILLIAM LAFLEUR  
JON PAUL LAMMERS

KELLI LANGDON  
WILLIAM C. LAWRENCE  
PHILIP KENT LEE  
CHRISTOPHER GREGORY LINDEN  
REBECCA SU LONGCROW  
SEAN PATRICK LYNCH  
JOHN CHARLES MADDEN  
APRIL LEANN MARTY  
ANNA MARIE MARX  
JOHN VERNON MATSON  
JASON F. MAUS  
BRANDON DANIEL MCANALLY  
JAMES HAMILTON McDONALD  
ROBERT LYNN MCKAY  
BETHANY LYNNE MEURET  
JASON E. MEYERS  
WILLIAM GRANT MULLIN  
PHILIP SAMUEL MURANTE  
DANIEL MUROW  
JESSICA ANN MURPHY  
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STEPHANIE MARIE NEVINS  
ERIKA ANN NICKEL  
LAURA ANN-MARIE NIGRO  
RYAN GARRETT NORMAN  
NICHOLAS CONNER OLARI  
JARED CHARLES OLSON  
KELLIE CHESIRE OLSON  
ADAM JAMES O'ROURKE  
GREGG ANDREW PAGE  
TARA ANNE PARPART  
Y. KAMAAL PATTERSON  
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MATTHEW DONALD PEDERSON  
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PERKINS  
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JENA CHRISTINE REED  
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ALICIA BREE ROBBINS  
ALISA MARIE ROSALES  
RORY J. ROUNDTREE  
ADAM JEFFREY ROUSE  
NICHOLAS K. RUDMAN  
DANIEL JAMES RUSSELL  
MEGAN MARIE RUWE  
JENEE YVETTE SAFFOLD  
KEVIN PATRICK SAVORY  
JILLIAN LEE SCHUACHER  
TYLER JOSEPH SCHUBAUER  
LINDSEY ANN SCHULER  
KYLE CHRISTOPHER SEAY  
SCOTT SHAVER  
CHRIS DUANE SHEPPERD  
MEGHAN ANNE SONENBERG  
LAURA JILAYNE SOVA  
TYLER KENT SPAHN  
MICHAEL LEE STAGEMAN  
SAMANTHA MARIE STALEY  
JOSHUA EARL TANNER  
NICHOLAS JOHN THIELEN  
RYAN JAMES THOMAS  
RACHEL ELIZABETH TIMM  
CHRISTINA L. USHER  
WESLEY JAMES VAN ERT  
HANNAH VELLINGA  
CHRISTINA LYNN VILLA  
KEVIN WILLIAM VONNAHME  
DAVID VOORMAN  
BENJAMIN JOSEPH WISCHNOWSKI  
CANDICE C. WOOSTER  
ELIZABETH ANNE YOUNT



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No. S-11-439: **State v. Jacob**. Affirmed. Cassel, J. Heavican, C.J., not participating.

No. S-12-056: **State v. Floyd**. Affirmed. McCormack, J. Miller-Lerman, J., participating on briefs. Wright, J., not participating.

Nos. S-12-346, S-12-347: **Reynolds v. Keith Cty. Bd. of Equal.** Affirmed. Heavican, C.J.

No. S-12-957: **State v. Moore**. Affirmed. Per Curiam. Connolly and McCormack, JJ., participating on briefs.

No. S-12-985: **State v. Tucker**. Reversed and remanded with directions. Wright, J.

Nos. S-12-1219, S-12-1220: **State v. House**. Affirmed in part, and in part reversed and remanded. Stephan, J. Heavican, C.J., and Cassel, J., not participating.

No. S-13-071: **State v. Jensen**. Affirmed as modified. Stephan, J. Heavican, C.J., not participating.



## LIST OF CASES DISPOSED OF WITHOUT OPINION

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No. S-11-688: **State ex rel. Counsel for Dis. v. Beltzer**. Application for reinstatement granted; John E. Beltzer's license to practice law in the State of Nebraska reinstated.

No. S-12-266: **Petersen v. City of Blair**. Stipulation granted. Appeal dismissed with prejudice.

No. S-12-589: **State v. Vela-Montes**. Motion of appellee for rehearing sustained. Appeal reinstated.

No. S-12-618: **State v. Galindo**. Order vacated, and cause remanded for further proceedings.

Nos. S-12-771, S-13-210, S-13-251, S-13-284: **27 Superior, L.L.C. v. Seldin**. Appeal dismissed as suggested in appellees' suggestion of mootness.

No. S-12-1139: **Zapata v. Roberts**. Portion of memorandum opinion of Nebraska Court of Appeals filed on May 21, 2013, that affirmed discovery sanctions is vacated and summarily dismissed; portion of decision dismissing remainder of appeal is summarily affirmed. See, § 2-107(A)(1) and (2); *Cunningham v. Hamilton County*, 527 U.S. 198, 119 S. Ct. 1915, 144 L. Ed. 2d 184 (1999); *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011). See, also, *Frederick v. Seeba*, 16 Neb. App. 373, 745 N.W.2d 342 (2008).

No. S-12-1152: **State v. Carter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-1170: **State v. Boppre**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-13-030: **State v. Hatcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-13-292: **State v. Yos-Chiguil**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. S-13-310: **State v. Prorok**. Stipulation considered; appeal dismissed.

No. S-13-378: **State v. Seberger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-13-464: **State v. Goynes**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. S-13-518: **State v. Abram**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-13-602: **Waite v. Regional West Med. Ctr.** Motion of appellee for summary dismissal sustained.

No. S-13-621: **Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.** Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. S-13-681: **State v. Hall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

## LIST OF CASES ON PETITION FOR FURTHER REVIEW

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No. A-10-981: **State v. Nadeem**. Petition of appellant for further review denied on July 10, 2013.

No. A-11-718: **State v. Bromm**. Petition of appellant for further review denied on June 19, 2013.

No. S-11-760: **State v. Pratt**, 20 Neb. App. 434 (2013). Petition of appellee for further review sustained on July 10, 2013.

Nos. A-11-806, A-11-974: **In re Guardianship & Conservatorship of Giventer**. Petitions of appellant for further review overruled on October 25, 2013, as premature.

No. S-12-082: **Steffy v. Steffy**, 20 Neb. App. 757 (2013). Petition of appellee for further review sustained on August 28, 2013.

No. A-12-091: **Curry v. Furby**, 20 Neb. App. 736 (2013). Petition of appellant for further review denied on July 10, 2013.

No. A-12-155: **Taylor v. City of Omaha**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-192: **Muzzey v. Ragone**, 20 Neb. App. 669 (2013). Petition of appellees for further review denied on June 12, 2013.

No. A-12-196: **Rudd v. Debora**, 20 Neb. App. 850 (2013). Petition of appellant for further review denied on August 28, 2013.

No. A-12-218: **State v. Kelly**, 20 Neb. App. 871 (2013). Petition of appellant for further review denied on August 28, 2013.

No. S-12-241: **State v. Taylor**. Petition of appellant for further review sustained on June 19, 2013.

No. A-12-273: **State v. Fessler**. Petition of appellant for further review denied on September 19, 2013.

Nos. A-12-281 through A-12-284: **In re Interest of Angelina G. et al.**, 20 Neb. App. 646 (2013). Petitions of appellant for further review denied on June 5, 2013.

No. S-12-296: **Kuhnel v. BNSF Railway Co.**, 20 Neb. App. 884 (2013). Petition of appellee for further review sustained on August 28, 2013.

No. A-12-355: **Mulder v. Mulder**. Petition of appellant for further review denied on June 5, 2013.

No. A-12-425: **Fast Ball Sports v. Metropolitan Entertainment**, 21 Neb. App. 1 (2013). Petition of appellant for further review denied on August 28, 2013.

No. S-12-454: **State v. Mortensen**. Petition of appellee for further review sustained on July 10, 2013.

No. A-12-463: **McCaulley v. Nebraska Furniture Mart**, 21 Neb. App. 125 (2013). Petition of appellee for further review denied on October 23, 2013.

No. A-12-477: **Klingelhoef v. Parker, Grossart**, 20 Neb. App. 825 (2013). Petition of appellant for further review denied on August 28, 2013.

No. A-12-494: **State v. Sledge**. Petition of appellant for further review denied on June 26, 2013.

No. A-12-505: **Collins v. Collins**, 21 Neb. App. 161 (2013). Petition of appellant for further review denied on October 23, 2013.

No. A-12-512: **Agee v. Sabatka-Rine**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-581: **State v. Quezada**, 20 Neb. App. 836 (2013). Petition of appellant for further review denied on August 28, 2013.

No. A-12-586: **Gocek v. Gocek**. Petition of appellant for further review denied on June 5, 2013.

Nos. A-12-593 through A-12-596: **In re Interest of Alisondra V. et al**. Petitions of appellant for further review denied on May 23, 2013.

No. S-12-615: **State v. Dalland**, 20 Neb. App. 905 (2013). Petition of appellee for further review sustained on August 28, 2013.

No. A-12-673: **Glantz v. Daniel**, 21 Neb. App. 89 (2013). Petition of appellant for further review denied on September 25, 2013.

No. A-12-730: **McCullough v. McCullough**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-742: **State v. Heath**, 21 Neb. App. 141 (2013). Petition of appellant for further review denied on September 11, 2013.

No. A-12-751: **Sharp v. Sharp**. Petitions of appellant for further review denied on June 19, 2013.

No. S-12-759: **State v. Filholm**. Petition of appellant for further review sustained on October 16, 2013.

No. A-12-766: **Lesser v. Eagle Hills Homeowners' Assn.** Petition of appellant for further review denied on July 10, 2013.

No. A-12-779: **Schlichtman v. Jacob**. Petition of appellant for further review denied on November 20, 2013.

No. A-12-790: **State v. Serr**. Petition of appellant for further review denied on October 30, 2013.

No. A-12-792: **State v. Kuku**. Petition of appellant for further review denied on June 3, 2013, as filed out of time.

No. A-12-806: **State v. Weidenbach**. Petition of appellant for further review denied on July 10, 2013.

No. S-12-811: **In re Interest of Mya C. & Sunday C.**, 20 Neb. App. 916 (2013). Petition of appellant for further review sustained on August 28, 2013.

No. A-12-823: **Becerra v. Sulhoff**, 21 Neb. App. 178 (2013). Petition of appellee for further review denied on October 30, 2013.

No. A-12-860: **In re Interest of Niko M.** Petition of appellant for further review denied on September 25, 2013.

No. A-12-861: **In re Interest of Samari M.** Petition of appellant for further review denied on September 25, 2013.

No. A-12-901: **In re Interest of Mathew H.** Petition of appellant for further review denied on June 5, 2013.

No. S-12-908: **State v. Abdullah**. Petition of appellant for further review sustained on September 19, 2013.

No. A-12-952: **Robertson v. Longo**. Petition of appellant for further review denied on June 12, 2013.

No. A-12-964: **State v. Boutin**. Petition of appellant for further review denied on June 5, 2013.

No. A-12-982: **Jacob v. Nebraska Dept. of Corr. Servs.** Petition of appellant for further review denied on October 16, 2013.

No. A-12-1030: **Dragon v. Dragon**, 21 Neb. App. 228 (2013). Petition of appellee for further review denied on October 30, 2013.

No. A-12-1056: **In re Interest of Talik S. et al.** Petition of appellant for further review denied on October 16, 2013.

No. A-12-1062: **State v. Zuck**. Petition of appellant for further review denied on August 28, 2013.

No. A-12-1074: **State v. Kirstine**. Petition of appellant for further review denied on July 22, 2013.

No. A-12-1110: **In re Interest of Gary L. & Leanna L.** Petition of appellant for further review denied on October 16, 2013.

No. A-12-1130: **State v. Billups**. Petition of appellant for further review denied on May 23, 2013.

No. S-12-1139: **Zapata v. Roberts**. Petition of appellant for further review sustained on August 28, 2013.

No. A-12-1177: **Piper v. Neth**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-1178: **Patti v. Patti**. Petition of appellant for further review overruled on November 14, 2013.

No. A-12-1185: **State v. Graves**. Petition of appellant for further review denied on September 25, 2013.

No. A-12-1192: **In re Interest of Thomas T.** Petition of appellant for further review denied on September 11, 2013.

No. A-12-1198: **Leon v. State.** Petition of appellant for further review denied on September 19, 2013.

No. A-13-008: **State v. Glazebrook.** Petition of appellant for further review denied on June 19, 2013.

No. A-13-013: **State v. Claussen.** Petition of appellant for further review denied on October 16, 2013.

No. A-13-066: **In re Interest of Danial B.** Petition of appellant for further review denied on October 16, 2013.

No. A-13-080: **Malone v. Cunningham.** Petition of appellant for further review denied on October 16, 2013.

No. A-13-086: **State v. Red Kettle.** Petition of appellant for further review denied on June 17, 2013.

No. A-13-114: **Klawitter v. Midlands Foot Specialists.** Petition of appellant for further review denied on June 12, 2013.

No. A-13-117: **State v. Castonguay.** Petition of appellant for further review denied on June 12, 2013.

No. A-13-125: **State v. Smith.** Petition of appellant for further review denied on September 19, 2013.

No. A-13-167: **Evans v. Thatcher.** Petition of appellant for further review denied on June 13, 2013, as untimely.

No. A-13-168: **In re Interest of Caleb A.** Petition of appellant for further review denied on October 23, 2013.

No. A-13-169: **In re Interest of Christian A.** Petition of appellant for further review denied on October 23, 2013.

No. A-13-170: **In re Interest of Raina A.** Petition of appellant for further review denied on October 23, 2013.

No. A-13-176: **State v. Machado.** Petition of appellant for further review denied on August 28, 2013.

No. A-13-186: **State v. Decoteau.** Petition of appellant for further review denied on August 28, 2013.

No. A-13-187: **State v. Red Kettle.** Petition of appellant for further review denied on June 17, 2013, as incomplete and premature.

No. A-13-228: **City of Omaha v. Mobeco Indus.** Petition of appellant for further review denied on August 28, 2013.

No. A-13-230: **City of Omaha v. Morello.** Petition of appellant for further review denied on August 28, 2013.

No. A-13-231: **State v. Xorxe-Perez.** Petition of appellant for further review denied on August 28, 2013.

No. A-13-249: **State v. Bowen.** Petition of appellant for further review denied on August 2, 2013, as untimely. See § 2-102(F)(1).

No. A-13-254: **State v. Gray**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-259: **State v. Wilson**. Petition of appellant for further review denied on September 11, 2013.

No. A-13-262: **State v. Purdie**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-291: **State v. Rasmussen**. Petition of appellant for further review denied on November 27, 2013.

No. A-13-298: **State v. Almansori**. Petition of appellant for further review denied on September 11, 2013.

No. A-13-316: **State v. Fletcher**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-324: **State v. Savery**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-332: **West Plains LLC v. Rosberg**. Petition of appellant for further review denied on October 16, 2013.

No. A-13-334: **Rosberg v. West Plains Co.** Petition of appellant for further review denied on October 16, 2013.

No. A-13-352: **State v. Allen**. Petition of appellant for further review denied on June 26, 2013.

No. A-13-468: **State v. Jones**. Petition of appellant for further review denied on November 14, 2013, as untimely filed. See § 2-102(F)(1).

No. A-13-474: **State v. Amerson**. Petition of appellant for further review denied on November 14, 2013.

No. A-13-565: **State on behalf of Aunre T. v. Henry P.** Petition of appellant for further review denied on October 30, 2013.

No. A-13-641: **In re Interest of Kena J.** Petition of appellant for further review denied on November 27, 2013.



CASES DETERMINED  
IN THE  
SUPREME COURT OF NEBRASKA

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ESTATE OF JOSEPH JAMES TEAGUE, DECEASED, BY AND THROUGH  
HIS PERSONAL REPRESENTATIVE, JOANI M. MARTINOSKY,  
APPELLANT, V. CROSSROADS COOPERATIVE ASSOCIATION,  
A NEBRASKA CORPORATION, APPELLEE.

834 N.W.2d 236

Filed May 31, 2013. No. S-12-702.

1. **Judgments: Statutes: Appeal and Error.** Concerning questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
3. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
4. **Workers' Compensation.** The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an accidental injury arising out of and in the course of employment.
5. **Motions to Dismiss: Torts: Workers' Compensation: Proof.** For an employee to prevail against a motion to dismiss a tort action against his or her employer, the employee must allege sufficient facts that, if true, would demonstrate the Nebraska Workers' Compensation Act does not apply.
6. **Workers' Compensation.** The primary object of the Nebraska Workers' Compensation Act is to do away with the inadequacies and defects of the common-law remedies; to destroy the common-law defenses; and, in the employments affected, to give compensation, regardless of the fault of the employer.
7. **Actions: Motions to Dismiss.** For purposes of a motion to dismiss, a court is not obliged to accept as true a legal conclusion couched as a factual allegation, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.
8. **Workers' Compensation.** Delay, cost, and uncertainty are contrary to the underlying purposes of the Nebraska Workers' Compensation Act.
9. **Workers' Compensation: Legislature: Intent: Employer and Employee: Time.** The Nebraska Workers' Compensation Act was intended by the Legislature to simplify legal proceedings and to bring about a speedy settlement of disputes

between the injured employee and the employer by taking the place of expensive court actions with tedious delays and technicalities.

10. **Workers' Compensation: Jurisdiction: Legislature.** As a statutorily created court, it is the role of the Legislature to determine what acts fall within the Workers' Compensation Court's exclusive jurisdiction.
11. **Workers' Compensation: Jurisdiction: Intent.** Absent an amendment to the Nebraska Workers' Compensation Act, an appellate court will not judicially create a "substantially certain" exception from the act's intended exclusive jurisdiction over workplace injuries.
12. **Motions to Dismiss: Records.** Even novel issues may be determined on a motion to dismiss where the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues.
13. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
14. **Special Legislation.** A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
15. **Workers' Compensation: Employer and Employee: Legislature.** Employers and employees stand in different relations to the common undertaking; it was rational for the Legislature to recognize this fact when determining employers' and employees' respective rights and liabilities under the workers' compensation system.
16. **Workers' Compensation: Negligence: Legislature.** It was not arbitrary for the Legislature to determine coverage under the Nebraska Workers' Compensation Act based on whose willful negligence caused the injury.
17. **Torts: Employer and Employee: Legislature.** The Legislature made a rational distinction between intentional tort victims who are employees and intentional tort victims who are not employees. Workers' compensation law reflects a policy choice that employers bear the costs of the employees' work-related injuries, because employers are in the best position to avoid the risk of loss by improving workplace safety.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Affirmed.

R. Kevin O'Donnell and Michael D. Samuelson, of McGinley, O'Donnell, Reynolds & Korth, P.C., L.L.O., for appellant.

Steven W. Olsen and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ., and RIEDMANN, Judge.

McCORMACK, J.

## I. NATURE OF CASE

The employer in this case willfully violated safety regulations and thereby caused the tragic death of one of its employees. The employee's estate brought tort actions against the employer in district court rather than seeking compensation under the Nebraska Workers' Compensation Act (the Act).<sup>1</sup> This it cannot do. Despite the egregiousness of the employer's conduct, the injury was still an "accident" as defined by the Act. The Act does not thereby unconstitutionally discriminate between employees and nonemployees or employee victims of employer willful negligence and employee victims of their own willful negligence. We therefore affirm the district court's dismissal of the estate's complaint.

## II. BACKGROUND

Joseph James Teague worked for Crossroads Cooperative Association (Crossroads). Teague was asked by his supervisor to enter a grain bin and shovel grain into the center of the bin's conical base in order to facilitate removal of grain from the bin. Teague died of asphyxiation after being engulfed in grain.

The grain bin was approximately 58 feet tall and 21½ feet in diameter. The depth of the grain in the bin was high enough to present an engulfment hazard and was higher on the sides than in the middle, such that it could slide onto employees. In violation of Occupational Safety and Health Administration (OSHA) regulations, Teague's supervisor sent Teague into the bin without a lifeline or any other equipment that could prevent engulfment past Teague's waist. The Crossroads facility where Teague worked also lacked adequate equipment for a rescue operation if engulfment were to occur, also in violation of OSHA regulations.

In accordance with Crossroads' customary practices, Teague's supervisor kept the auger running in the bin in order to facilitate extraction of the grain. This was in clear violation

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<sup>1</sup> Neb. Rev. Stat. § 48-101 et seq. (Reissue 2004 & Cum. Supp. 2006).

of OSHA regulations and created movement of the grain, increasing the engulfment hazard.

In further violation of OSHA regulations mandating that a supervisor maintain communication with an employee in a grain bin at all times, Teague's supervisor stepped momentarily away from his observation of Teague in the bin. When the supervisor returned, Teague was dead.

OSHA assessed civil penalties against Crossroads. In addition, Crossroads pleaded guilty to the criminal charge of willfully violating OSHA regulations by knowingly permitting an employee to enter a grain bin in violation of safety standards requiring that an auger system be turned off, locked out, and tagged while an employee is in a grain bin.

The personal representative of Teague's estate (Estate) brought this action in the district court against Crossroads for wrongful death and assault and battery, and for a declaratory judgment that either the Act does not apply or, alternatively, that it is unconstitutional on its face and as applied.

The district court granted Crossroads' motion to dismiss for failure to state a claim. The district court relied on *Abbott v. Gould, Inc.*,<sup>2</sup> wherein we held that the employer's knowing misrepresentation concerning the hazards of the job did not take the employer's conduct outside the exclusivity of the Act. The court found that the facts alleged in the Estate's petition, even if true, would not constitute "'willful and unprovoked physical aggression'" by an employee, officer, or director of Crossroads. In other words, the court found that the Estate's allegations of assault and battery were legal conclusions unsupported by the facts alleged. The court concluded that the incident resulting in Teague's death was an "accident" under the Act,<sup>3</sup> and the court found no merit to the Estate's claims that the Act is unconstitutional. The Estate appeals.

### III. ASSIGNMENTS OF ERROR

The Estate makes the following assignments of error: (1) The district court erred in sustaining Crossroads' motion to

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<sup>2</sup> *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989).

<sup>3</sup> See §§ 48-101 and 48-111.

dismiss for failure to state a claim upon which relief can be granted; (2) the district court erred in determining that the Act applies to this case; (3) the district court erred in failing to recognize an exception to the exclusivity provisions of the Act in light of the facts of this case; (4) the district court erred in failing to conclude that by applying the exclusivity rule of the Act to the Estate, the Act improperly deprives it, and other similar individuals, of due process, equal protection, and a right to trial by jury and that the Act imposes special legislation; (5) the district court erred in dismissing the Estate's constitutional claims because the ultimate success of constitutional arguments are not a proper issue under a motion to dismiss pursuant to the Nebraska Court Rules of Pleading in Civil Cases.<sup>4</sup>

#### IV. STANDARD OF REVIEW

[1] Concerning questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.<sup>5</sup>

[2] A district court's grant of a motion to dismiss is reviewed de novo.<sup>6</sup>

[3] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.<sup>7</sup>

#### V. ANALYSIS

The Estate asserts that because it alleged intentional tortious conduct, Teague's death was not an "accident" covered by the exclusive jurisdiction of the Workers' Compensation Court. Alternatively, the Estate argues that the Act is unconstitutional

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<sup>4</sup> Neb. Ct. R. Pldg. § 6-1112(b)(6).

<sup>5</sup> *Harsh International v. Monfort Indus.*, 266 Neb. 82, 622 N.W.2d 574 (2003).

<sup>6</sup> *Valentine, O'Toole v. Midwest Neurosurgery*, 285 Neb. 80, 825 N.W.2d 425 (2013).

<sup>7</sup> *Id.*

insofar as it distinguishes between willful negligence of employers and willful negligence of employees, and between employed intentional tort victims and unemployed intentional tort victims. The Estate also contends that dismissal under § 6-1112(b)(6) is generally inappropriate when a complaint alleges constitutional issues. We find no merit to these contentions.

1. WAS INJURY CAUSED BY  
“ACCIDENT” UNDER ACT?

[4,5] The Act is an employee’s exclusive remedy against an employer for an accidental injury arising out of and in the course of employment.<sup>8</sup> The employer, by having liability imposed by the Act without fault, receives in return relief from tort actions.<sup>9</sup> Thus, for an employee to prevail against a motion to dismiss a tort action against his or her employer, the employee must allege sufficient facts that, if true, would demonstrate the Act does not apply.<sup>10</sup> The Estate’s complaint failed to make sufficient allegations that, if true, would state a cause of action outside the exclusive jurisdiction of the Act.

The Estate’s complaint alleged Crossroads committed intentional torts and criminal OSHA violations that were certain or substantially certain to result in Teague’s injury or death. OSHA regulations explicitly state that they do not supersede or in any way affect the workers’ compensation laws of the various states.<sup>11</sup> The Estate argues, however, that because of the willfulness of Crossroads’ violations of the OSHA regulations, Teague’s death was not the result of an “accident” under the Act. Thus, the Estate argues that the district court erred in dismissing the complaint.

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<sup>8</sup> See, *Ihm v. Crawford & Co.*, 254 Neb. 818, 580 N.W.2d 115 (1998); *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975); *Memorial Hosp. of Dodge Cty. v. Porter*, 4 Neb. App. 716, 548 N.W.2d 361 (1996).

<sup>9</sup> *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986).

<sup>10</sup> See, *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 792 N.W.2d 484 (2011); *Jones v. Roszbach Coal Co.*, 130 Neb. 302, 264 N.W. 877 (1936).

<sup>11</sup> 29 U.S.C. § 653(b)(4) (2006).

But this court has long held that there is no intentional tort exception to the Act.<sup>12</sup> In pertinent part, the Act defines an “accident” as “an unexpected or unforeseen injury happening suddenly and violently, *with or without human fault*.”<sup>13</sup> In *Abbott*, we affirmed the dismissal of the employees’ consolidated complaints in the district court alleging common-law actions stemming from numerous egregious intentional acts by the employer.<sup>14</sup> The employees’ complaints alleged that their employer had intentionally subjected the employees to contact with and ingestion of particles and fumes known to be injurious to human health; had intentionally failed to provide adequate safeguards at the worksite; had intentionally hidden the effects of the toxic exposures from the employees; and that, as part of a coverup, had intentionally misrepresented that certain drugs would prevent any harmful effects of the exposure—but in fact, such drugs caused independent harm. To do anything other than affirm the dismissal of the employees’ complaints, we explained, would subvert the primary object of the Act.

[6] The primary object of the Act, we said, is “‘to do away with the inadequacies and defects of the common-law remedies, to destroy the common-law defenses, and, in the employments affected, to give compensation, *regardless of the fault of the employer*.’”<sup>15</sup> Furthermore, an intentional tort exception would re-focus the inquiry from whether it arose out of and in the course of employment to the state of mind of the employer and employee.<sup>16</sup> We disapproved even of the notion that deliberate acts with specific intent to injure the employee could fall outside the Act.<sup>17</sup> In *Harsh International v. Monfort Indus.*,<sup>18</sup> a third-party contribution action, we reaffirmed that

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<sup>12</sup> See *Abbott v. Gould, Inc.*, *supra* note 2.

<sup>13</sup> § 48-151(2) (emphasis supplied).

<sup>14</sup> *Abbott v. Gould, Inc.*, *supra* note 2.

<sup>15</sup> *Id.* at 913, 443 N.W.2d at 595 (emphasis in original).

<sup>16</sup> *Abbott v. Gould, Inc.*, *supra* note 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Harsh International v. Monfort Indus.*, *supra* note 5.

intentional tortious conduct by an employer falls within the exclusive jurisdiction of the Act.

[7] The Estate asks that we reexamine our holdings in *Abbott* and *Harsh* and that we adopt an intentional tort exception to the Act. To be clear as to what kind of exception is at issue, the Estate does not argue on appeal that Crossroads acted with specific intent to injure Teague. While the complaint sometimes seemed to assert that Crossroads acted with a specific intent to harm Teague, the district court properly found that these were conclusory statements unsupported by any of the facts alleged in the complaint. For purposes of a motion to dismiss, a court is not obliged to accept as true a legal conclusion couched as a factual allegation, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.<sup>19</sup>

Reading the complaint generously, it alleged facts that could show Crossroads intentionally ignored safety rules and concealed known dangers from its employees and that Crossroads knew serious injury to an employee was virtually or substantially certain to occur as a result. We decline the Estate's invitation to overrule precedent and adopt an exception to the workers' compensation exclusivity rule that would allow such a tort action to continue in district court.

It is the "almost unanimous rule" that any intentional conduct exception to the workers' compensation exclusivity rule cannot be "stretched to include accidental injuries caused by the gross, wanton, wil[l]ful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury."<sup>20</sup> In other words, even in jurisdictions recognizing some intentional injury exception to the workers' compensation exclusivity rule, knowingly permitting a hazardous work condition, knowingly

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<sup>19</sup> See *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

<sup>20</sup> 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 103.03 at 103-7 (2011).

ordering employees to perform an extremely dangerous job, willfully failing to furnish a safe place to work, willfully violating a safety statute, or withholding information about worksite hazards, still falls short of the kind of actual intention to injure that robs the injury of accidental character.<sup>21</sup> Even in jurisdictions adopting an intentional tort exception, anything short of genuine and specific intent to injure by the employer or the alter ego of the employer will fall within the exclusivity of the workers' compensation act.<sup>22</sup>

The Estate's complaint could be saved only if we were to adopt not just an intentional conduct exception, but one with a broader definition of intentional. Only about a dozen jurisdictions have taken this approach. Those courts have adopted a broader definition of intentional that allows an employer to be sued in tort if the employer knew the tortious conduct was "substantially certain" to result in employee injury (or a similar test).<sup>23</sup> We decline to adopt such an exception.

Several of the jurisdictions adopting a "substantially certain" exception have statutes distinct from our own. Those statutes either specify a particular test to exempt the employer's conduct from the workers' compensation act or generally exempt from the workers' compensation act injury resulting from the employer's intentional conduct.<sup>24</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> See *id.*, §§ 103.03 and 103.06.

<sup>23</sup> See, *id.*, § 103.04[1] at 103-9. See, also, *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99, 639 A.2d 507 (1994); *Pendergrass v. R.D. Michaels, Inc.*, 936 So. 2d 684 (Fla. App. 2006); *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981); *Travis v. Dreis & Krump Mfg Co.*, 453 Mich. 149, 551 N.W.2d 132 (1996); *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 501 A.2d 505 (1985); *Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272, 34 P.3d 1148 (2001); *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); *Parret v. UNICCO Service Co.*, 127 P.3d 572 (Okla. 2005); *Harn v. Continental Lumber Co.*, 506 N.W.2d 91 (S.D. 1993); *Reed Tool Co. v. Copelin*, 689 S.W.2d 404 (Tex. 1985); *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946).

<sup>24</sup> See, Cal. Lab. Code § 3602(b)(2) (West Cum. Supp. 2013); Fla. Stat. Ann. § 440.11(1)(b) (West 2009); La. Rev. Stat. Ann. § 23:1032(B) (2010); N.J. Stat. Ann. § 34:15-8 (West 2011).

There appears to be a struggle in those jurisdictions to contain the “substantially certain” exception to the limited circumstances for which it was intended. As observed in Larson’s Workers’ Compensation Law,<sup>25</sup> one may understand the urge to chip away at the exclusiveness barrier in some of the more egregious cases of employer negligence, but “experience has shown that, once a breach is made in that dam to accommodate an appealing case, it will be very difficult for the courts to know where to draw the line.”

[8,9] The blurred line of the “substantially certain” test and the inquiry into the employer’s state of mind or, in some jurisdictions, the abstract reasonable employer’s state of mind, interjects complexities, costs, delays, and uncertainties into the compensation process. Delay, cost, and uncertainty are contrary to the underlying purposes of the Act. The Act was intended by the Legislature to simplify legal proceedings and to bring about a speedy settlement of disputes between the injured employee and the employer by taking the place of expensive court actions with tedious delays and technicalities.<sup>26</sup>

[10] Regardless of the egregiousness of the employer’s actions, the question is what court has jurisdiction over the employee’s claim. This is a workers’ compensation law question, not a tort question.<sup>27</sup> The Workers’ Compensation Court is a statutorily created court designed to have jurisdiction over all injuries falling within the scope of the Act. As a statutorily created court, it is the role of the Legislature to determine what acts fall within the Workers’ Compensation Court’s exclusive jurisdiction.<sup>28</sup> The Act creates rights which did not exist at common law, and the Legislature may place such restrictions thereon as it sees fit.<sup>29</sup>

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<sup>25</sup> See 6 Larson & Larson, *supra* note 20, § 103.04[4] at 103-39.

<sup>26</sup> See, *Gill v. Hrupek*, 184 Neb. 436, 168 N.W.2d 377 (1969); *Beideck v. Acme Amusement Co.*, 102 Neb. 128, 166 N.W. 193 (1918).

<sup>27</sup> 6 Larson & Larson, *supra* note 20.

<sup>28</sup> See *Grandt v. Douglas County*, 14 Neb. App. 219, 705 N.W.2d 600 (2005).

<sup>29</sup> *Id.*

[11] We assume that our interpretation of the Act in *Abbott* and *Harsh* was consistent with the Legislature's intended meaning, as the Legislature has had innumerable occasions to express a contrary intent.<sup>30</sup> Indeed, the definition of "accident" under the Act has remained substantially unchanged since the enactment of § 48-151 in 1913.<sup>31</sup> Changes in the workers' compensation laws, and in the public policies recognized in those laws, must emanate from the lawmaking power of the Legislature and not from the courts.<sup>32</sup> Absent an amendment to the Act, we will not judicially create a "substantially certain" exception from the Act's intended exclusive jurisdiction over workplace injuries.

## 2. IS ACT UNCONSTITUTIONAL?

The Estate alternatively argues that if injuries resulting from intentional tortious conduct by the employer are the result of an "accident" under the Act, then the Act is unconstitutional. Before reaching the Estate's constitutional arguments, however, we must address the Estate's argument that it is premature for this court to do so.

### (a) Scope of Motion Pursuant to § 6-1112(b)(6)

The Estate asserts that insofar as it raised constitutional challenges to the Act, its complaint was not properly the subject of a motion to dismiss pursuant to § 6-1112(b)(6). The Estate argues that such issues are "substantive" and cites the proposition that "[b]ecause a [§ 6-11]12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss."<sup>33</sup> The Estate's reliance on this proposition is misplaced. The complaint was dismissed

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<sup>30</sup> See *Johnsen v. Benson Food Center*, 143 Neb. 421, 9 N.W.2d 749 (1943).

<sup>31</sup> 1913 Neb. Laws, ch. 198, § 52, p. 601.

<sup>32</sup> See, e.g., *Matheson v. Minneapolis Street Ry. Co.*, 126 Minn. 286, 148 N.W. 71 (1914).

<sup>33</sup> *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 82, 727 N.W.2d 447, 452 (2007).

because the Act precludes tort actions for work-related injuries, not on the underlying substantive merits of the Estate's alleged tort claims.

[12] A plaintiff does not immunize a complaint against a § 6-1112(b)(6) motion to dismiss merely by challenging the constitutionality of the laws governing the ability to state the alleged claim. Even novel issues may be determined on a motion to dismiss where the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues.<sup>34</sup> Because the constitutional arguments raised in the Estate's complaint do not depend upon the development of the alleged facts, the complaint was properly the subject of a motion to dismiss. We consider now the correctness of the district court's determination that the facts, assumed as true, failed to demonstrate a cause of action in the district court.

#### (b) Disparate Categories of Tort Victims

The Estate argues that the Act creates unconstitutionally disparate standards of exclusivity for employees versus employers. The Estate also argues that the Act creates an unconstitutional distinction between intentional tort victims who are employees and intentional tort victims who are not employees. According to the Estate, such classifications or disparate treatment violate the equal protection, due process, and special legislation provisions of the U.S. and Nebraska Constitutions. Because the employers and employees—and employed and unemployed tort victims—are not similarly situated, it was rational and proper for the Legislature to treat those categories differently under the Act. To the extent that the Estate makes a cognizable argument under the three constitutional principles cited, that argument is without merit.

[13] Under the Equal Protection Clause, economic and social welfare categorizations are subject to a rational basis

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<sup>34</sup> *Madison v. American Home Products Corp.*, 358 S.C. 449, 595 S.E.2d 493 (2004).

review.<sup>35</sup> The Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.<sup>36</sup> The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.<sup>37</sup>

Due process, as relates to the legislative challenges here, is similarly satisfied, so long as the Legislature's power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose.<sup>38</sup>

[14] The Estate's arguments on special legislation also depend on whether the Legislature has acted arbitrarily and unreasonably. A Legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.<sup>39</sup> The Estate does not argue that the Act created a permanently closed class.

[15] As the U.S. Supreme Court and other jurisdictions have recognized, employers and employees stand in different relations to the common undertaking.<sup>40</sup> It was rational for the

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<sup>35</sup> See *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981). See, also, *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); *Schiel v. Union Oil Co. of California*, 219 P.3d 1025 (Alaska 2009).

<sup>36</sup> *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006).

<sup>37</sup> See *id.*

<sup>38</sup> *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

<sup>39</sup> *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

<sup>40</sup> See, e.g., *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 39 S. Ct. 227, 63 L. Ed. 527 (1919); *Cunningham v. Aluminum Co. of America, Inc.*, 417 N.E.2d 1186 (Ind. App. 1981); *Matheson v. Minneapolis Street Ry. Co.*, *supra* note 32.

Legislature to recognize this fact when determining employers' and employees' respective rights and liabilities under the workers' compensation system.<sup>41</sup>

Employers agree under the Act to be liable without fault for accidental injuries sustained by employees in the scope and course of their employment.<sup>42</sup> These were injuries for which employers were not liable under common law.<sup>43</sup> Employers also give up, under the Act, affirmative defenses to liability such as assumption of risk and contributory negligence.<sup>44</sup>

Employees, for their part, give up potentially larger awards under tort law in exchange for a broader and more predictable basis for liability.<sup>45</sup> Employees were also given a quicker and more cost-effective means to obtain compensation than through the traditional tort system.<sup>46</sup>

[16] As the Estate frames the categories and the distinctions, when the injury is caused by the employee's willful negligence, the exclusivity of the Act does not apply; when the injury is caused by the employer's willful negligence, the exclusivity of the Act does apply. But the categorizations crafted by the Estate are not the ones the Legislature had in mind. Employees generally gave up their rights to recover under tort law, but they received in exchange no-fault benefits that they quickly receive for most economic losses from work-related injuries.<sup>47</sup> Compensability under the Act was meant to be a benefit for the employee, not solely a protection for the employer. The Legislature simply drew the line of employer liability—and thus the “exclusivity” of the Act—at the point where the

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<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., *New York Central R. R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917).

<sup>43</sup> *Id.*

<sup>44</sup> See *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

<sup>45</sup> See, *New York Central R. R. Co. v. White*, *supra* note 42; *Jackson v. Morris Communications Corp.*, *supra* note 44.

<sup>46</sup> *Id.*

<sup>47</sup> *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

employee's willful negligence caused his or her own injury. Employees injured by the employer's willful negligence will be compensated under the Act, but employees injured by their own willful negligence will not be compensated under the Act. It was not arbitrary for the Legislature to determine coverage under the Act based on whose willful negligence caused the injury.

[17] Likewise, the Legislature made a rational distinction between intentional tort victims who are employees and intentional tort victims who are not employees. Workers' compensation law reflects a policy choice that employers bear the costs of employees' work-related injuries, because employers are in the best position to avoid the risk of loss by improving workplace safety.<sup>48</sup> Such policy does not support the idea that employers should bear the cost of injuries incurred outside of employment. The Act is simply not designed to govern the rights of nonemployees. As such, employees and nonemployees, whether victims of intentional torts or of simple negligence, are not similarly situated. The Legislature did not act arbitrarily or unreasonably in treating these distinct categories differently.

The Estate also briefly mentions the right to a trial by jury guaranteed by the Seventh Amendment. The Estate writes: "For example, but without limitation, because intentional torts and criminal conduct are not an accident, individuals such as [the Estate] should not lose their right to a trial by jury."<sup>49</sup> To the extent this qualifies as an argument and that it raises any point not already addressed, the U.S. Supreme Court has rejected Seventh Amendment challenges to workers' compensation laws.<sup>50</sup> We find no merit to the Estate's argument that the Act violates the Estate's right to a jury trial.

The particular compromises made in crafting the Act are rational and relevant to the purposes of the Act. The distinct

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<sup>48</sup> *Id.*

<sup>49</sup> Brief for appellant at 26.

<sup>50</sup> *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917).

treatment or categorizations that may follow from the workers' compensation scheme will not always result in mathematical niceties and, in some circumstances, may lead to inequality.<sup>51</sup> But this does not make the Act unconstitutional. The Estate has failed to sustain its burden<sup>52</sup> of establishing the unconstitutionality of the Act under the equal protection, due process, special legislation, or right-to-jury provisions of the U.S. and Nebraska Constitutions.

## VI. CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of the Estate's complaint. The Estate must seek compensation from the employer for Teague's death exclusively from the Workers' Compensation Court.

AFFIRMED.

CASSEL, J., not participating.

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<sup>51</sup> See *Otto v. Hahn*, *supra* note 35.

<sup>52</sup> See, e.g., *State ex rel. Bruning v. Gale*, 284 Neb. 257, 817 N.W.2d 768 (2012).

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STATE OF NEBRASKA, APPELLANT, V.  
ERIC C. THACKER, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V. GAIL  
L. MORGAN-THACKER, APPELLEE.

834 N.W.2d 597

Filed May 31, 2013. Nos. S-12-895, S-12-896.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Appeal and Error.** An appellate court reviews questions of law independently of the lower court.
3. **Criminal Law: Statutes: Appeal and Error.** It is a fundamental principle of statutory construction that courts strictly construe penal statutes, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
4. **Criminal Law: Statutes: Legislature: Intent.** A court gives penal statutes a sensible construction, considering the Legislature's objective and the evils and mischiefs it sought to remedy.

5. **Criminal Law: Statutes.** A court will not apply a penal statute to situations or parties not fairly or clearly within its provisions.
6. \_\_\_\_: \_\_\_\_\_. Ambiguities in a penal statute are resolved in the defendant's favor.
7. **Schools and School Districts: Parent and Child.** Neb. Rev. Stat. § 79-201(2) (Cum. Supp. 2010) does not require parents to enroll their child in a legally recognized school until they obtain the State's recognition of an exempt homeschool.
8. **Words and Phrases.** The word "or," when used properly, is disjunctive.
9. **Schools and School Districts: Time.** Under Neb. Rev. Stat. § 79-201(2) (Cum. Supp. 2010), an exempt school's ability to complete the minimum instruction hours is the only timing requirement imposed upon an exempt school's calendar year.

Appeals from the District Court for Dawson County, JAMES E. DOYLE IV, Judge, on appeal thereto from the County Court for Dawson County, CARLTON E. CLARK, Judge. Exceptions overruled.

Michael R. Johnson, Deputy Dawson County Attorney, for appellant.

Mark R. McKeone, of Mark R. McKeone, P.C., L.L.O., and Michael P. Farris and Peter K. Kamakawiwoole, Jr., of Home School Legal Defense Association, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

### SUMMARY

Eric C. Thacker and Gail L. Morgan-Thacker (collectively the Thackers) sought to homeschool their children but did not obtain state recognition of their homeschool until October 2011. They did not enroll their five children in any legally recognized school before then. In a joint trial, the county court convicted Eric and Gail individually of five misdemeanor counts—one for each child—for violating Nebraska's compulsory education statute.<sup>1</sup> The county court convicted the Thackers of violating the statute from August 17, 2011 (when the public school calendar year began), to October 4 (when

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<sup>1</sup> See Neb. Rev. Stat. § 79-201 (Cum. Supp. 2010).

the State received notice that the Thackers would homeschool their children). After consolidating the Thackers' appeals, the district court reversed. The State has appealed under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008), asking for a decision to provide precedent under § 79-201 for future cases.

The State contends that § 79-201 required the Thackers to ensure that their children attended a legally recognized school every day of that school's calendar year until their request to operate a homeschool became effective. The Thackers contend that Nebraska's statutes and regulations required them to do only two things: (1) have their children attend their home-school every day that it was in session; and (2) complete the minimum required hours of instruction by June 30, 2012, the end of the school year.

We conclude that § 79-201 did not criminalize the Thackers' failure to enroll their children in a legally recognized school pending the State's recognition of their homeschool. We overrule the State's exceptions.

### BACKGROUND

In March 2011, the Thackers moved to Farnam, Nebraska, from New Jersey. Farnam is in the Eustis-Farnam Public Schools district. In 2011, the public school calendar year started on August 17. The principal of the public school learned about the Thackers in March. After a couple of weeks, when the family did not enroll their children in school, he contacted the county attorney.

In April 2011, a sheriff's officer contacted Eric about the children's not being in school. Eric told the officer that he and Gail were homeschooling their children but that they had finished the curriculum for their 2010-11 school year before they moved to Farnam. The officer informed Eric that they must file paperwork with the State and contact the school district or that they could be violating the law. Eric then contacted the principal, who told Eric that they must file paperwork with the Department of Education (the Department) over the summer if they intended to homeschool their children. The Thackers did not enroll their children in public school. Around the middle of September, the principal

wrote the county attorney that the children were not enrolled in public school.

Gail testified that after the family moved to Farnam, Eric received a job offer in Kentucky and they believed they would be moving there at the end of September 2011. Instead, Eric received a promotion at his job in North Platte, Nebraska, and the Thackers planned on homeschooling. Based on their religious objections, they applied to the Department for an exemption from state approval and accreditation requirements for schools. Gail said that they sent in the paperwork to the Department about the end of September but that the envelope was returned because she had not addressed it properly; she resent the envelope. Their signatures on the forms were notarized on September 27, 2011.

The Commissioner of Education acknowledged receipt of the Thackers' documents on October 6, 2011. On the same day, the commissioner sent a report to all public school superintendents listing the parents from whom the commissioner had received the required forms for homeschooling by October 4. The report stated that the commissioner recognized the Thackers' homeschool as of October 6. Gail testified that they planned to start homeschooling on November 14. On October 11, the State charged the Thackers with violating § 79-201 from August 17 through October 4.

At trial, the Thackers argued that they did not violate § 79-201 because their children had attended their exempt homeschool each day that it was in session. They argued that the State had not proved they could not complete the minimum hours of instruction required by state law before June 30, 2012 (the end of the school year). Gail testified that they started their homeschool on November 7, 2011, and that they could complete the required hours before June 30, 2012. But the State argued that until an exempt school is in session and conducting classes, the children must be enrolled in some type of legally recognized school, and that the Thackers' children were not.

The county court found that the Thackers could complete the required hours by the end of the school year. But it determined that they were guilty of violating § 79-201 from August 17 to

October 4, 2011. The Thackers appealed to the district court, which consolidated their appeals.

The district court reversed the decisions and remanded the causes with instructions for the county court to vacate the Thackers' convictions and sentences. The court concluded that for the first year of operation, the statutes and regulations required only that the Thackers begin the operation of their homeschool so that they could complete the required minimum hours of instruction by June 30, 2012. The Department's regulations set June 30 as the end of the school year for the Thackers' homeschool. The court concluded that the Thackers were not required to enroll their children in the public schools pending the start of their exempt homeschool. It further concluded that the Thackers' compliance with § 79-201 was not controlled by whether they had enrolled their children in an exempt school by the start date for the public school calendar year. Because the county court had found that the Thackers could complete the required minimum hours of instructions, the district court reversed.

### ASSIGNMENTS OF ERROR

The State assigns, restated, that the district court erred as follows:

(1) determining that § 79-201 does not require parents to ensure that their school-age children attend a state approved or accredited school until the parents obtain an exemption;

(2) determining that Neb. Rev. Stat. § 79-1601(3) (Cum. Supp. 2012) does not establish the "effective" date of a parent's election statement as the date it is received by the Commissioner of Education; and

(3) determining that the evidence admitted at trial was insufficient to support the convictions.

### STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law.<sup>2</sup> We review questions of law independently of the lower court.<sup>3</sup>

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<sup>2</sup> See *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013).

<sup>3</sup> See *State v. Bree*, 285 Neb. 520, 827 N.W.2d 497 (2013).

### ANALYSIS

The State contends that § 79-201 presumes students will be enrolled in and attending a public school until a parent enrolls his or her child in a different school that the State recognizes. It concedes that § 79-201 allows parents to educate their children in other types of legally recognized schools. But it argues that until a parent obtains the State's recognition of a private homeschool, the child must be attending some legally recognized school during the public school calendar year. And it argues that under § 79-1601(3), the State's recognition of a private homeschool is not effective until the Department receives a parent's notarized statement of intent.

The Thackers contend that § 79-201 only required them to have their children attend their exempt homeschool every day that it was in session and to complete the minimum hours of instruction required by law. They argue that Nebraska's statutes do not preclude them from starting a homeschool after the public school calendar year begins or compel them to enroll their children in a public school until their homeschool begins operation.

We agree with the Thackers. We view the State's argument through the prism of statutory construction principles that apply to penal statutes.

[3-6] It is a fundamental principle of statutory construction that we strictly construe penal statutes, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.<sup>4</sup> We give penal statutes a sensible construction, considering the Legislature's objective and the evils and mischiefs it sought to remedy.<sup>5</sup> We will not apply a penal statute to situations or parties not fairly or clearly within its provisions.<sup>6</sup> So, ambiguities in a penal statute are resolved in the defendant's favor.<sup>7</sup>

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<sup>4</sup> See *State v. McCarthy*, 284 Neb. 572, 822 N.W.2d 386 (2012).

<sup>5</sup> See *State v. Fuller*, 279 Neb. 568, 779 N.W.2d 112 (2010).

<sup>6</sup> See *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

<sup>7</sup> See *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

Under Neb. Rev. Stat. § 79-210 (Reissue 2008), a person violating a compulsory education statute<sup>8</sup> is guilty of a Class III misdemeanor. As stated, the State charged Eric and Gail with five counts each of violating § 79-201. Section 79-201(2), in relevant part, provides the following:

[E]very person residing in a school district within the State of Nebraska who has legal or actual charge or control of any child who is of mandatory attendance age or is enrolled in a public school shall cause such child to enroll in, if such child is not enrolled, and attend regularly a public, private, denominational, or parochial day school which meets the requirements for legal operation prescribed in Chapter 79, or a school which elects pursuant to section 79-1601 not to meet accreditation or approval requirements, *each day that such school is open and in session*, except when excused by school authorities or when illness or severe weather conditions make attendance impossible or impracticable.

(Emphasis supplied.)

Section 79-1601 sets out the requirements for obtaining an exemption from state approval and accreditation requirements for schools. Under § 79-1601(3), an election to operate an exempt school is effective when the Commissioner of Education receives a signed statement from the parents or legal guardians of all attending students that provides the following information: (1) their reason for electing not to educate their child at a state accredited or approved school; and (2) their commitments that an authorized representative of the parents or legal guardians will submit information to prove that, generally, the school will meet the requirements for basic skills instruction in specified subjects.

This filing requirement applies to any private, denominational, or parochial school that “elects not to meet state accreditation or approval requirements.”<sup>9</sup> Private, unaccredited

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<sup>8</sup> See Neb. Rev. Stat. §§ 79-201 to 79-210 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011).

<sup>9</sup> § 79-1601(3).

schools include homeschools.<sup>10</sup> If the parent representative does not provide the required information, or if any other requirements for obtaining exempt status are not met, the Department will notify the school district in which an attending child resides that the child is not attending an exempt school under § 79-201.<sup>11</sup>

The State contends that this filing requirement for exempt schools and other notification statutes support its position that parents must enroll their children in public school until they obtain State recognition of an exempt school (one that is not subject to accreditation or approval requirements). It argues that school districts have the duty to enforce the compulsory education statutes. And it argues that the notice requirements in Nebraska's statutes allow the superintendents of public school districts to track whether a child in their district is or is not attending a legally recognized school.

We agree that school districts have a duty to enforce school attendance requirements and that notice requirements help superintendents track children's school attendance in their districts.<sup>12</sup> For example, each school must provide the public school superintendent with the children's names who are enrolled in their school and the names of any children who enter or withdraw from the school during the school session. This information is required so the superintendent can enforce § 79-201.<sup>13</sup> And, as stated, the Department will notify a school district about any children who are not attending a recognized exempt school.<sup>14</sup>

[7] But under the law as written, we do not agree that a child must be attending a recognized exempt school each day of the public school calendar year. Nor do we read § 79-201(2) as requiring parents to enroll their child in a legally recognized school until they obtain the State's recognition of an exempt

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<sup>10</sup> See, generally, 92 Neb. Admin. Code, chs. 12 and 13 (2010).

<sup>11</sup> *Id.*, ch. 13, § 006.

<sup>12</sup> See §§ 79-206, 79-208, and 79-209.

<sup>13</sup> See §§ 79-205 and 79-207.

<sup>14</sup> See 92 Neb. Admin. Code, ch. 13, § 006.

homeschool. Instead, § 79-201(2) provides that a child must “attend regularly a public, private, denominational, or parochial day school . . . *or* a school which elects pursuant to section 79-1601 not to meet accreditation or approval requirements, *each day that such school is open and in session.*” (Emphasis supplied.)

[8] The word “or,” when used properly, is disjunctive.<sup>15</sup> So the requirement in § 79-201(2) that a child attend school regularly “each day that such school is open and in session” refers to alternative school choices. That is, a child’s required attendance at “such school” refers to a school subject to state accreditation or approval requirements or an exempt school not subject to such requirements.

And § 79-201(2) does not make the start of the public school calendar year the default start date for other schools. Nor does it provide that a child must attend a legally recognized school each day of the public school year. The State’s interpretation could have unintended consequences for private and parochial schools that operate on a different calendar year than their respective public school district. To the extent that § 79-201(2) is ambiguous whether a child must be enrolled and attending a legally recognized school until the State recognizes an exempt private school, we construe that ambiguity against the State.

Furthermore, the Department’s regulations do not require parents to ensure that their child attends a legally recognized school each day of the public school year. Neb. Rev. Stat. § 79-318(5)(c) (Cum. Supp. 2010) authorizes the Department to establish the standards and procedures for exempt schools under § 79-1601. The Department’s chapter 13 regulations—for exempt schools established because of a parent’s religious objections to the State’s accreditation requirements—define a “school year” as “the period of instruction between July 1 and the following June 30.”<sup>16</sup> But nothing in Nebraska’s statutes or

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<sup>15</sup> *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011).

<sup>16</sup> 92 Neb. Admin. Code, ch. 13, § 002.04.

regulations sets a deadline for the filing requirement in the first year of an exempt school's operation.

It is true that § 79-1601(6) clarifies that if a school fails to comply with the exemption procedures, there could be criminal consequences for a child's parent or legal guardian:

Any school which elects not to meet state accreditation or approval requirements and does not meet the requirements of subsections (2) through (6) of this section shall not be deemed a school for purposes of section 79-201, and the parents or legal guardians of any students attending such school shall be subject to prosecution pursuant to such section or any statutes relating to habitual truancy.

But neither Nebraska's statutes nor the Department's regulations set out a deadline for an exempt school to begin operations. The regulations require only that a notarized statement from an exempt school's parent representative be filed "[t]hirty days prior to the date on which the exempt school is to begin operation, and annually thereafter by July 15 . . . ."<sup>17</sup> So although the regulations set a filing deadline for an exempt school's second year of operation, they conspicuously omit a filing deadline for the first year.

The only timing requirement for an exempt school's calendar year is imposed by the Department's regulations for minimal instruction hours:

Prior to the date that the exempt school begins operation, and annually thereafter by July 15, the parent representative will submit to the Commissioner or designee the following:

004.01 A calendar for the school year indicating a minimum instruction of 1,080 hours in secondary schools and 1,032 hours in elementary schools. During the first year of operation, the days of instruction may be prorated based upon the remaining balance of the school year.<sup>18</sup>

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<sup>17</sup> *Id.*, § 003.02A.

<sup>18</sup> *Id.*, § 004.

[9] Arguably, the regulation's reference to prorating days of instruction could be read to imply that the student has already completed some days of instruction. As stated, § 79-318(5)(c) authorizes the Department to establish the standards and procedures for exempt schools. But we will not interpret the Department's regulations to impose a requirement that carries criminal consequences when that requirement is not clearly imposed under the governing statute. So the district court correctly determined that under § 79-201(2), an exempt school's ability to complete the minimum instruction hours is the only timing requirement imposed upon an exempt school's calendar year.

We recognize that at some point in the school year, an exempt homeschool would begin operations too late. That is, it could not reasonably prorate the required instructional hours in the remaining days if the students had not previously completed some instruction hours in a legally recognized school. But we need not decide when in the school year that point occurs. Here, the county court specifically found that the Thackers could complete the required instructional hours in the school year. Because the State did not show that the Thackers could not meet the only timing requirement imposed on their homeschool's operation, the district court correctly reversed the county court's decisions and remanded the causes with instructions for the county court to vacate the convictions and sentences.

EXCEPTIONS OVERRULED.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE  
OF THE NEBRASKA SUPREME COURT, RELATOR,  
v. KEVIN K. STEPHENSON, RESPONDENT.  
834 N.W.2d 235

Filed May 31, 2013. No. S-13-323.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK,  
MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

### INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Kevin K. Stephenson, on April 16, 2013. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

### STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on October 27, 2006. On February 13, 2013, after a 2-day jury trial before the district court for Greeley County, Kansas, the jury found respondent guilty of two counts of theft arising out of respondent's representation of an estate. See *State v. Stephenson*, Greeley County District Court, case No. 2011 CR 28. On May 3, the district court for Greeley County filed its journal entry of sentencing, which was modified by its nunc pro tunc order filed on May 15. Respondent's sentence began April 30, and he was sentenced to 16 months' imprisonment with 4 days' credit for time served and 24 months' postrelease supervision. Respondent was also ordered to pay restitution of \$117,408.68 to the estate. After his convictions, respondent self-reported this matter to the Counsel for Discipline of the Nebraska Supreme Court.

On April 16, 2013, respondent filed a voluntary surrender in which he stated that he is aware that the Counsel for Discipline is currently investigating the events surrounding his convictions in Kansas. Respondent further stated that he does not contest the truth of the suggested allegations

being made against him. Respondent further stated that he freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

### ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

(A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.

(1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the suggested allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

### CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the suggested allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly,

respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

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BRAUNGER FOODS, LLC, FORMERLY KNOWN AS TOBA  
OF IOWA, LLC, DOING BUSINESS AS BRAUNGER  
FOODS, APPELLANT, v. MICHAEL K. SEARS  
AND HUNGRY'S NORTH, INC., APPELLEES.

834 N.W.2d 779

Filed June 14, 2013. No. S-11-1109.

1. **Contracts.** Whether a contract exists is a question of fact.
2. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
3. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
4. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
5. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults.
6. **Contracts: Guaranty: Appeal and Error.** To determine the obligations of the guarantor, an appellate court relies on general principles of contract and guaranty law.
7. **Contracts: Guaranty: Intent.** Because a guaranty is a contract, it must be understood in light of the parties' intentions and the circumstances under which the guaranty was given.
8. **Guaranty: Liability.** When the meaning of a guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
9. **Contracts: Guaranty: Words and Phrases.** A guaranty is a collateral undertaking to answer for the payment of debt or the performance of a contract or duty, and when a guaranty is unambiguous, a court does not vary its terms by construing it with another instrument.

10. **Guaranty.** The undertaking of a guaranty is independent of the promise of the principal obligation.

Petition for further review from the Court of Appeals, IRWIN, PIRTLE, and RIEDMANN, Judges, on appeal thereto from the District Court for Dakota County, PAUL J. VAUGHAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jeana L. Goosmann and Anthony L. Osborn, of Goosmann Law Firm, P.L.C., for appellant.

Jeffrey T. Myers for appellees.

Michael K. Sears, pro se.

HEAVICAN, C.J., CONNOLLY, WRIGHT, STEPHAN, McCORMACK, and CASSEL, JJ.

PER CURIAM.

#### NATURE OF CASE

Braunger Foods, LLC, filed this action against Michael K. Sears and Hungry's North, Inc. (Hungry's), seeking to recover amounts that Braunger Foods alleged were due for sales it had made on credit to Hungry's. The district court for Dakota County entered judgment against Hungry's for amounts it concluded were owing to Braunger Foods due to sales of products to Hungry's. However, the court concluded that a guaranty, by which Braunger Foods sought to hold Sears personally liable for the debt, was ineffective, and the court therefore entered no judgment against Sears. Braunger Foods appealed to the Nebraska Court of Appeals and assigned error to the district court's conclusion that the guaranty was not enforceable against Sears. Neither Hungry's nor Sears appealed the finding and money judgment against Hungry's based on Hungry's receipt of products from Braunger Foods. The Court of Appeals affirmed the district court's order. *Braunger Foods v. Sears*, 20 Neb. App. 428, 823 N.W.2d 723 (2012).

We granted Braunger Foods' petition for further review. We conclude that the guaranty was enforceable against Sears. We therefore reverse the decision of the Court of Appeals and

remand the cause to the Court of Appeals with directions to reverse the decision of the district court with respect to Sears and to remand the cause to the district court with directions to enter judgment against Sears in accordance with this opinion.

### STATEMENT OF FACTS

Braunger Foods sold food product supplies to Hungry's, a business owned by Sears. Braunger Foods began selling to Hungry's in 2004 on an open account. Hungry's began to fall behind on payments in 2006 but resumed timely payments later that year.

When Hungry's again began falling behind on payments in 2009, Braunger Foods put Hungry's on cash-on-delivery status. Before it would allow Hungry's to resume buying on credit, Braunger Foods asked Sears to sign certain documents that included a separate guaranty designed to obligate Sears personally for all debts to Braunger Foods incurred by Hungry's.

The documents Braunger Foods asked Sears to sign were included in a package titled "Confidential Customer Application & Account Form." The package included a page titled "Credit Application" and another page that contained two sections; one section was titled "Terms & Conditions," and another section was titled "Guaranty." Significant portions of the page titled "Credit Application" were left uncompleted, but Hungry's name, address, and business telephone number were listed on designated lines at the top of that page.

In the "Terms & Conditions" section of the other page, which section generally states that the customer is applying to Braunger for credit and that the customer agrees to certain terms and conditions of payment, Sears signed his name as "Officer/Owner/Partner" and identified Hungry's as the customer. The line designated for "Braunger Foods representative" was left blank. A line designated for the date was completed as "11-16-09."

The separate "Guaranty" section provided as follows:

I/We, the undersigned, for in and [sic] consideration of Braunger Foods extending credit at my/our request to the business entity identified above, (hereinafter referred

to as the Customer) hereby personally guaranty payment of all obligations of the customer (including all interest, attorney fees and charges) to Braunger Foods (“the Indebtedness”) and do hereby agree to bind myself to pay Braunger Foods on demand any sums which may become due it by the customer, whether or not demand has been made on the customer. It is understood that this guaranty is unconditional, and shall be continuing and irrevocable for such Indebtedness of the customer to Braunger Foods as presently or hereafter exists. The undersigned hereby waives all notices and demands of any kind, including notice of default or nonpayment or deferral for payment, and consent to any extensions of time to pay, modification or renewal of the above credit agreement or any release of modification of security for the indebtedness. The undersigned hereby waives and releases all rights of contribution or Indemnity by customer. Additionally, the undersigned guarantor(s) agree to pay, in the event the “Indebtedness” becomes delinquent, Braunger Foods’ attorneys fees associated with collection of the “indebtedness” plus all attendant collection costs whether or not litigation is initiated. The undersigned also agrees that venue for any action brought will be in the state and county in which Braunger Foods branch supplying product is located. This guaranty is personal to the undersigned. Any notation of corporate capacity shall be taken as informational only and shall not effect [sic] the personal nature of the guaranty.

At the bottom of the “Guaranty” section, “Hungry’s North Inc.” was printed on a line designated as “Print Name” and Sears signed his name on the line below that line. We note that, contrary to a statement in the Court of Appeals’ opinion that “[t]here [is a space] on the second page for the signature of a Braunger Foods representative . . . under the section containing the guaranty, but [that space was] left blank,” see *Braunger Foods v. Sears*, 20 Neb. App. 428, 430, 823 N.W.2d 723, 725 (2012), there does not appear to be a space under the guaranty that is intended for the signature of a Braunger Foods representative.

After Hungry's again fell behind on payments, Braunger Foods filed this suit against Sears and Hungry's in April 2010 to recover the amount of unpaid invoices. After a bench trial, the district court entered judgment against Hungry's for the amount of unpaid invoices plus interest. The court specified that the unpaid amounts included \$31,882.73 for sales of food products to Hungry's from September 5 through November 14, 2006, and \$25,599.09 for sales of food products to Hungry's from October 7, 2009, through March 30, 2010. The court calculated interest on these amounts through the date of its order and entered a total judgment against Hungry's of \$82,307.26 plus postjudgment interest. Although the district court's judgment reflects an implicit finding that there was a contracted arrangement between Braunger Foods and Hungry's, the court nevertheless concluded that the guaranty was not enforceable against Sears. As its reason for refusing to enforce the guaranty, the district court stated that at the bottom of the page on which the "Guaranty" appeared, there was a statement "'I/WE PERSONALLY GUARANTEE PAYMENT ON TERMS THAT ARE APPROVED,'" and that the credit application was "incomplete and never officially signed by anyone from" Braunger Foods. The court therefore entered no judgment against Sears personally.

Braunger Foods appealed to the Court of Appeals and claimed that the district court erred when it found that the personal guaranty was not enforceable against Sears. Neither Hungry's nor Sears appealed the finding and money judgment against Hungry's. The Court of Appeals affirmed the district court's judgment.

We granted Braunger Foods' petition for further review.

### ASSIGNMENT OF ERROR

Braunger Foods claims that the Court of Appeals erred when it concluded that the personal guaranty was not enforceable against Sears.

### STANDARDS OF REVIEW

[1,2] Whether a contract exists is a question of fact. *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269

Neb. 692, 695 N.W.2d 665 (2005). The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012).

[3] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

[4] A guaranty is interpreted using the same general rules as are used for other contracts. *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008).

#### ANALYSIS

Braunger Foods claims that the Court of Appeals and the district court erred when they concluded that the personal guaranty was not enforceable against Sears. As explained below, we conclude that although the credit application as a whole was not complete, the guaranty was complete in itself without reference to the rest of the credit application, and that the guaranty applied to all credit extended by Braunger Foods to Hungry's, whether or not such credit was extended under the terms provided in the credit application or under the terms of other oral or implied agreements. Accordingly, we find merit to Braunger Foods' assignment of error and conclude that the guaranty is enforceable against Sears.

[5-8] A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults. *First Nat. Bank of Unadilla v. Betts*, 275 Neb. 665, 748 N.W.2d 76 (2008). To determine the obligations of the guarantor, this court relies on general principles of contract and guaranty law. *Id.* Because a guaranty is a contract, it must be understood in light of the parties' intentions and the circumstances under which the guaranty was given. *Id.* When the meaning of a guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms. *Id.*

In the view of both the district court and the Court of Appeals, the scope and enforceability of the guaranty in this

case depended on whether the credit application as a whole was a complete and enforceable contract. Both courts concluded that the credit application was not complete and that therefore, neither the guaranty nor any section of the credit application was enforceable. This reasoning was flawed.

[9,10] We have described a guaranty as a collateral undertaking to answer for the payment of debt or the performance of a contract or duty, and we have stated that when a guaranty is unambiguous, we do not vary its terms by construing it with another instrument. See *Builders Supply Co. v. Czerwinski*, *supra*. We have further stated that the undertaking of a guaranty is independent of the promise of the principal obligation. See *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978). Because a guaranty is a separate and independent agreement, we consider whether the guaranty in this case is itself enforceable, without reference to whether the entire credit application was complete and whether other sections of the application were enforceable.

Viewing the guaranty section as a separate agreement, we conclude that it was complete and enforceable against Sears with respect to any indebtedness Hungry's incurred for goods purchased on credit from Braunger Foods. The language of the guaranty states generally that, in exchange for Braunger Foods' extending credit to the identified business entity, Hungry's, the signer will "personally guaranty payment of all obligations of the customer . . . to Braunger Foods." The guaranty was signed by Sears, and contrary to a statement in the Court of Appeals' opinion, there was not a space at the bottom of the guaranty for the signature of a Braunger Foods representative.

The language of the guaranty does not limit its scope to obligations incurred as a result of sales made pursuant to the specific terms set forth in the credit application. The statement at the bottom of the guaranty that the signer guarantees payment "on terms that are approved" does not thereby limit the obligation to the terms stated in the application but, giving the language its plain and ordinary meaning, reasonably applies to all terms that are agreed to which logically includes

other terms agreed to and approved by the parties. See *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012) (terms of contract are to be accorded their plain and ordinary meaning). We conclude that the enforceability of the guaranty was not dependent on completion of the entire credit application and that instead, the guaranty was enforceable in itself.

The guaranty provides that Sears agrees “to pay . . . any sums which may become due.” By its terms, the guaranty applied to any indebtedness Hungry’s incurred for purchases on credit from Braunger Foods. Although the district court concluded that the sales terms of the incomplete credit application were not enforceable, the court nevertheless found that an agreement or agreements existed, whether oral or implied, between Braunger Foods and Hungry’s for the sale of goods, because the court concluded that Hungry’s owed Braunger Foods for sales made in 2006 and in 2009 through 2010 in the amount of \$82,307.26, including prejudgment interest. No party disputed this conclusion either on appeal to the Court of Appeals or on further review to this court. Thus, the context in which we consider this appeal is that it is an established fact that Hungry’s owes Braunger Foods \$82,307.26 for the receipt of goods based on an enforceable agreement.

The district court found that the guaranty was not enforceable because the terms of sale provided for in the credit application were not approved. However, this finding was inconsistent with its undisputed finding that Hungry’s owed Braunger Foods for unpaid invoices; such finding necessarily included a finding that the parties had agreed to and approved some terms for the sale of goods. Because the finding that Hungry’s owed Braunger Foods certain amounts for unpaid invoices was not disputed, and Sears had guaranteed any indebtedness of Hungry’s to Braunger Foods, it was clear error for the district court to find that the guaranty was not enforceable with respect to such amounts, and the Court of Appeals erred when it affirmed this determination.

The lack of the signature of a Braunger Foods representative does not alter our conclusion in this case in which Braunger Foods seeks to enforce the guaranty against Sears,

who personally signed the guaranty. Nebraska's statute of frauds, Neb. Rev. Stat. § 36-202 (Reissue 2008), provides in part that "every special promise to answer for the debt, default, or misdoings of another person" shall be void unless it is "in writing, and subscribed by the party to be charged therewith." In order for Braunger Foods to enforce the written guaranty against Sears, only Sears' signature was required, and the signature of a Braunger Foods representative was not required to make the guaranty enforceable against Sears.

The language of the guaranty undermines two other arguments made by Sears. First, Sears argues that because he wrote the name "Hungry's North Inc." above his signature and indicated his capacity as president, he was signing on behalf of Hungry's rather than himself, and that the effect of the guaranty was simply for Hungry's to guaranty its own indebtedness. However, the guaranty states, "This guaranty is personal to the undersigned. Any notation of corporate capacity shall be taken as informational only and shall not effect [sic] the personal nature of the guaranty." Therefore, under the guaranty's own terms, the inclusion of the name "Hungry's North Inc." and Sears' title as president vis-a-vis Hungry's are to be taken as informational only and the guaranty remains Sears' personal guaranty.

Sears also argues that if a guaranty exists, it applies only to credit extended after the guaranty was signed and not to debt that had already been incurred. Sears notes that the district court order indicated that the judgment against Hungry's includes amounts incurred both before and after the guaranty was signed by Sears. Contrary to Sears' argument, the guaranty states that the guaranty is "for such Indebtedness of the customer to Braunger Foods as presently or hereafter exists." Therefore, in consideration of Braunger Foods' extending further credit to Hungry's, Sears gave his personal guaranty both for debt existing at the time the guaranty was signed as well as for debt incurred thereafter. The guaranty therefore applies to all amounts that the district court found owing from Hungry's to Braunger Foods.

In sum, we conclude that the guaranty should be considered as an agreement separate from the rest of the credit application.

As such, the guaranty was complete, and by its terms, it was enforceable against Sears as to all amounts that the court found owing from Hungry's to Braunger Foods.

### CONCLUSION

We conclude that the Court of Appeals erred when it determined that the guaranty was not enforceable against Sears and when it therefore affirmed the district court's order. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to reverse the decision of the district court as it pertains to Sears' guaranty and to remand the cause to the district court with directions to enter judgment against Sears in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V.

GARY L. SIKES, APPELLANT.

834 N.W.2d 609

Filed June 14, 2013. No. S-12-399.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
5. \_\_\_\_\_. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts surrounding the defendant's life.
6. \_\_\_\_\_. A sentence at the maximum limit is still within that limit—it is only if the sentence exceeds the statutory limit that it becomes "excessive" as a matter of law.

Appeal from the District Court for Hall County: WILLIAM T. WRIGHT, Judge. Affirmed.

Vicky A. Kenney and Matthew Works, Deputy Hall County Public Defenders, for appellant.

Jon Bruning, Attorney General, George R. Love, and Dain J. Johnson, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

#### NATURE OF CASE

Gary L. Sikes pled guilty to driving under the influence, third offense, a Class W misdemeanor. The district court for Hall County accepted Sikes' plea and found him guilty. It sentenced him to 365 days' imprisonment with 1 day's credit for time served, fined him \$600, and revoked his driver's license for a period of 15 years. The district court further ordered that after a 45-day no-driving period, if Sikes chooses to drive, he must obtain an ignition interlock permit, install an interlock device on each motor vehicle he owns or operates, and utilize a continuous alcohol monitoring (CAM) device for the entire 15-year revocation. Sikes appeals, claiming various errors with respect to the sentence and sanctions imposed. We determine that no error occurred, and we affirm.

#### STATEMENT OF FACTS

Sikes was originally charged in the district court with fourth-offense driving under the influence, a Class IIIA felony. Pursuant to a plea agreement, Sikes pled guilty to the amended information charging him with third-offense driving under the influence, a Class W misdemeanor. The district court accepted his plea and found him guilty. The district court ordered a pre-sentence investigation.

The factual basis for the plea indicates that on July 27, 2011, Sikes was pulled over in Grand Island, Hall County, Nebraska, for a driving infraction. Upon making contact with Sikes, the law enforcement officer detected impairment. A sobriety test was conducted by a certified drug recognition expert who determined that Sikes was driving under the influence of marijuana. A crime laboratory later tested a sample of Sikes'

urine and detected marijuana. Sikes stipulated that before this incident, he had two prior convictions for driving under the influence.

Sikes appeared for sentencing on April 11, 2012. The record shows that defense counsel urged the court to consider probation, but the district court rejected this proposal. In explaining its decision not to place Sikes on probation, the district court emphasized that although Sikes was pleading guilty to the crime of third-offense driving under the influence, the presentence investigation report indicated that it was actually Sikes' seventh offense of either driving while intoxicated or driving while under the influence. The court further noted that within the last 5 years, between December 2006 and July 2011, Sikes had been convicted of the offense of driving under the influence of either alcohol or another substance four times. The court addressed Sikes at sentencing and stated that

not only did you become intoxicated or use, you chose to drive at the same time. The element of the offense that creates the risk and the circumstances that you are in is that you chose to drive. From 2006 to present date, you chose to drive five times while under the influence of either alcohol or some other substance.

Quite frankly, I think your counsel did an excellent job for you in getting this pled down from a 4<sup>th</sup> [offense] to a 3<sup>rd</sup>, because rather than looking at jail time, you would be looking at prison. You are a significant danger to the people of Grand Island and the people of Hall County. You are a significant danger to the people of this state because you repeatedly chose to drive while under the influence. I can't, in good conscience, place you on probation simply to allow you to go through the same treatment you've been through before and put the rest of us at risk.

Based upon the Court's review of the record in this case, the presentence investigation prepared, and the foregoing factors, I have determined you're not a candidate for probation because there is a substantial risk that you will continue your criminal conduct, and you are in

need of correctional treatment best provided by a correctional facility, and any less sentence would depreciate the seriousness of your crime, which is significant, but also promote disrespect for the law.

Quite frankly, sir, you've got an attitude that doesn't stop. You've got an attitude that society is mistreating you because it sanctions you when you become under the influence of something and then drive. It's an attitude I'll have to change.

As noted above, the district court sentenced Sikes to 365 days' imprisonment with 1 day's credit for time served, fined him \$600, and revoked his license for 15 years. The district court stated that after a 45-day period of no driving, if Sikes chooses to drive, he must obtain and install an ignition interlock device on each motor vehicle he owns or operates and that he must retain a permit and the ignition interlock device for the entire 15-year period. At the hearing, the district court further stated that Sikes "must, during any period of time that [he is] driving following [his] release from confinement, use a [CAM] device for the entire 15 year period of [his] revocation."

In its written order, filed April 12, 2012, the district court ordered the same terms as orally pronounced, except that in connection with the use of the CAM device, the written order added the additional phrase that Sikes must "abstain from alcohol use" for the period of interlock revocation.

Sikes appeals.

### ASSIGNMENTS OF ERROR

On appeal, restated, Sikes claims that (1) it was error for the district court to order him to use a CAM device, because the monitoring of alcohol use is not related to the facts underlying his current conviction, namely, having driven under the influence of marijuana; (2) it was error for the district court to state in its written order that Sikes must abstain from alcohol use during the interlock revocation period because in its oral pronouncement the court did not include abstention from alcohol use as a sanction; and (3) the sentence and sanctions imposed were excessive.

### STANDARDS OF REVIEW

[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013).

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

### ANALYSIS

Sikes assigns three errors. Each of the assigned errors is governed by the Nebraska Rules of the Road, Neb. Rev. Stat. §§ 60-601 through 60-6,381 (Reissue 2010). Sikes seeks a ruling analyzing the propriety of the sentence and sanctions imposed. We find his appeal proper and consistent with § 60-6,197.03(4) (providing that order “shall be administered upon . . . final judgment of any appeal”). Compare *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008), and *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998) (stating that constitutional challenges to potential penalties not ripe).

#### *Ordering the Use of a CAM Device Was Not Error.*

In his first assignment of error, Sikes asserts that in the instant case, he was convicted of driving under the influence of marijuana, and that since a CAM device is used to detect the presence of alcohol in a person’s system, see § 60-614.01, the order directing him to utilize a CAM device is unrelated to the offense for which he was convicted. Sikes misconstrues the law, and there is no merit to this assignment of error as presented.

In this case, Sikes was convicted of his third offense of driving under the influence. Section 60-6,196(1) provides that “[i]t shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle . . . (a) [w]hile under the influence of alcoholic liquor or of any drug.” Section 60-6,196(2) provides that “[a]ny person who operates or is in

the actual physical control of any motor vehicle while in a condition described in subsection (1) of this section shall be guilty of a crime and upon conviction punished as provided in sections 60-6,197.02 to 60-6,197.08.”

Sikes is guilty of violating § 60-6,196(1)(a), and therefore, he is subject to the sanctions provided for violating § 60-6,196. A person convicted of his or her second or subsequent violation of § 60-6,196 is subject to the sanction of using a CAM device. See § 60-6,197.01(2). This conviction was deemed Sikes’ third conviction for driving under the influence.

In this case, Sikes bears the status of an individual convicted of § 60-6,196(1)(a), third offense. He is subject to all statutorily authorized restrictions therefor. The sanction of using a CAM device is statutorily authorized for a person convicted of third-offense driving under the influence. Accordingly, the district court did not err when it ordered that Sikes use a CAM device.

*Ordering the Abstention From Alcohol Use  
in Connection With the Use of a CAM  
Device for the Interlock Period of  
Revocation Was Not Error.*

In his second assignment of error, Sikes claims that because the oral pronouncement did not specify abstention from alcohol use, he should not have been ordered to abstain from alcohol use in connection with his use of a CAM device during the interlock revocation period, as the written order provided. Because abstention from alcohol use in connection with the use of a CAM device during the interlock revocation period is required by statute in this case, we find no merit to this claim.

The State has provided a helpful summary of the applicable law as follows:

If the sentencing court elects to provide the defendant[s] with the interlock option, the court can further require that they are outfitted with a CAM device and refrain from the use of alcohol for a period of time not to exceed the maximum term of license revocation ordered by the court. Neb. Rev. Stat. § 60-6,197.01(2). The district court

in the present instance elected to give Sikes the option to acquire interlock and CAM devices if Sikes chooses to continue driving.

Brief for appellee at 9. Given the law, the State urges us to reject Sikes' second assignment of error. We agree with the State that this assignment of error is without merit.

To understand the basis for our rejection of Sikes' claim, we must review numerous statutes. Pursuant to § 60-6,197.03(4), a person convicted of driving under the influence who has had two prior convictions is guilty of a Class W misdemeanor and subject to the penalties and sanctions therefor. Section 60-6,197.03(4) provides that the court shall revoke the convicted person's operator's license for 15 years and "issue an order pursuant to section 60-6,197.01."

In order for the convicted person to operate a motor vehicle during revocation, pursuant to § 60-6,197.01(1)(b), the court shall issue an order that a person convicted of a second or subsequent violation of driving under the influence obtain an ignition interlock permit and install an ignition interlock device on each vehicle the person owns or operates. Pursuant to § 60-6,197.01(2), if a person is convicted of his or her second or subsequent violation of driving under the influence, in addition to the interlock device, the court "may" order the use of a CAM device. Under § 60-6,197.01(2), however, "[a CAM] device shall not be ordered for a person convicted of a second or subsequent violation unless the installation of an ignition interlock device is also required."

Reading § 60-6,197.01(1)(b) and (2) together, the statute provides that in order for a person convicted of his or her second or subsequent offense of driving under the influence to operate a motor vehicle during revocation, the court shall require an ignition interlock device and may order the use of a CAM device. But if a CAM device is ordered, the court shall also order the use of an ignition interlock device.

[3] With respect to the conditions associated with the use of a CAM device, Sikes contends that even though the use of a CAM device has been ordered, a convicted person need not abstain from alcohol use. We reject this assertion. Section 60-6,211.05 provides for the statutorily required

conditions associated with the use of a CAM device. Section 60-6,211.05(2) provides that where the court has ordered the use of a CAM device, the terms of the use of the CAM device shall be the “use of a [CAM] device and abstention from alcohol use at all times.” We have stated that statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013). Under the plain language of § 60-6,211.05(2), if the court orders the use of a CAM device, the convicted person using the CAM device must abstain from alcohol use at all times.

In connection with his assignment of error, Sikes urges us to strike the additional matter in the written order, such that the order to abstain from alcohol use while using a CAM device would be eliminated. Sikes refers us to *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000), and argues that an oral sentencing pronouncement controls over a subsequent written order. Given the facts in this case, the principles in *Schnabel* do not control.

We acknowledge that there is some difference between the oral pronouncement and the language of the written order regarding the utilization of the CAM device. At the hearing, the district court orally stated that Sikes “must, during any period of time that [he is] driving following [his] release from confinement, use a [CAM] device for the entire 15 year period of [his] revocation.” In its written order, the district court included the additional phrase, which states that in connection with the use of the CAM device, Sikes must “abstain from alcohol use” for the period of interlock revocation.

Although the oral pronouncement is not precisely the same as the written order, the oral pronouncement was sufficient. It was not a mispronouncement in need of correction. Compare *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009) (stating erroneous oral pronouncement of sentence gave defendant more credit for time served than reflected by record, and thus district court had authority to correct this error in its written sentencing order). As explained above, the ordering of

the use of a CAM device is by operation of law ordering the convicted person to utilize the CAM device at all times and abstain from alcohol use at all times. See § 60-6,211.05(2). Thus, when the district court orally stated that Sikes must use a CAM device, pursuant to the statutes, it was effectively ordering Sikes to use the CAM device and abstain from alcohol use at all times.

As a general matter, it would be preferable for a sentencing court to orally state that the convicted person was to use the CAM device at all times during the period of revocation and that the convicted person must, as a consequence of using the CAM device, also abstain from alcohol use at all times; however, failure to do so does not invalidate the oral pronouncement or result in any meaningful discrepancy with the written order. The statutes control and amplify the sanctions; and the statutes require that where utilization of the CAM device has been ordered, the convicted person must abstain from the use of alcohol at all times. In sum, we determine that the oral pronouncement was sufficient and not meaningfully different from the written order and that the written order to abstain from alcohol use was not erroneous. We find no merit to Sikes' second assignment of error.

*The Sentence and Sanctions Were  
Not an Abuse of Discretion.*

For his third assignment of error, Sikes claims that the district court abused its discretion because it imposed an excessive sentence. We find no merit to this assignment of error.

[4-6] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts surrounding the defendant's life. *Id.* An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). A sentence at the maximum limit is still within that limit—it is only if the sentence exceeds the

statutory limit that it becomes “excessive” as a matter of law. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

At the time Sikes was convicted, Neb. Rev. Stat. § 28-106 (Reissue 2008) provided that driving under the influence, third offense, was a Class W misdemeanor punishable as follows: “[m]aximum — one year imprisonment and six hundred dollars fine[;] [m]andatory minimum — ninety days imprisonment and six hundred dollars fine.” In addition, § 60-6,197.03(4) requires that a person convicted of driving under the influence, third offense, shall have his or her license revoked for 15 years. As discussed above, in order for the convicted person to drive during revocation, § 60-6,197.01(1)(b) provides that the court order the convicted person to obtain an ignition interlock permit and install an ignition interlock device on all the vehicles the person owns or operates. For a defendant convicted of driving under the influence second or subsequent offense, who chooses to drive, § 60-6,197.01(2) provides that the court may order the convicted person to utilize a CAM device and abstain from the use of alcohol. If the court orders a CAM device, it must also order the ignition interlock device.

Sikes was sentenced to 365 days’ imprisonment with 1 day’s credit for time served, fined \$600, and had his license revoked for a period of 15 years. After a 45-day period of no driving following his release from jail, Sikes was given the option to drive during revocation by obtaining and installing an ignition interlock device. Should he choose to drive, Sikes was also ordered to utilize a CAM device and abstain from alcohol use for the 15-year period. The sentence and sanctions imposed were within the statutory limits.

The record shows that a presentence investigation was ordered. It reflects that Sikes has a criminal record, including a history of driving under the influence. The district court properly considered Sikes’ prior driving convictions in imposing the sentence and sanctions. See *State v. Ramirez*, *supra*.

The presentence investigation report indicates that Sikes is 53 years old, has completed high school, and was unemployed. Sikes’ criminal history includes convictions for numerous traffic violations, contributing to the delinquency of a minor, flight to avoid arrest, resisting arrest, third degree assault,

driving during suspension (four times), disturbing the peace (two times), attempted obstruction of a peace officer, third-degree domestic assault, violation of a protection order, theft by unlawful taking (two times), and first degree criminal trespass. The presentence investigation report also indicates that prior to the conviction at issue in this case, Sikes had been convicted of driving while intoxicated twice and driving under the influence four times. Because of his convictions, Sikes has been on probation eight times, which probation was revoked on one occasion.

The presentence investigation report further shows that, overall, Sikes falls into the “High Risk” range using the “Level of Service/Case Management Inventory,” which is a risk/need assessment tool specifically designed to determine the degree of risk that the defendant presents to the community. Sikes scored in the “High Risk” range for the “Alcohol/Drug Problem” category on the inventory, and the report states that Sikes “admits he has had a problem with his use of alcohol including several arrests for [driving under the influence].” The presentence investigation report also shows that the “Simple Screening Instrument,” which is an assessment tool used to determine the presence of a current substance abuse problem and identify the need for further assessment, was administered by a probation officer. The results indicate that Sikes has a moderate to high risk for alcohol or drug abuse.

We further note that at the hearing, the district court emphasized the fact that in the last 5 years, “[f]rom 2006 to present date, [Sikes] chose to drive five times while under the influence of either alcohol or some other substance.” In view of the facts of the case and Sikes’ record, we determine that the sentence and sanctions imposed are appropriate and that the district court did not abuse its discretion.

### CONCLUSION

We determine that the district court did not err when it ordered that, should Sikes choose to drive, he utilize a CAM device and abstain from alcohol use for the period of the

interlock revocation. The sentence and sanctions imposed were not an abuse of discretion. Therefore, we affirm.

AFFIRMED.

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BRUCE HOLDSWORTH, APPELLEE, V. GREENWOOD FARMERS  
COOPERATIVE AND COOPERATIVE MUTUAL INSURANCE  
COMPANY, INC., APPELLANTS.  
835 N.W.2d 30

Filed June 14, 2013. No. S-12-403.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. **Jurisdiction.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Statutes.** The meaning of a statute is a question of law.
4. **Jurisdiction.** Jurisdiction does not relate to the right of the parties as between each other, but to the power of the court.
5. \_\_\_\_\_. Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
6. \_\_\_\_\_. The jurisdiction of courts is a public matter that cannot be affected by a private agreement, and the jurisdiction of a court can neither be acquired nor lost as a result of an agreement of the parties.
7. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. **Workers' Compensation: Penalties and Forfeitures: Attorney Fees.** The waiting-time penalty and attorney fees for waiting-time proceedings provided under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012) are rights under the Nebraska Workers' Compensation Act.
9. **Workers' Compensation: Penalties and Forfeitures: Waiver.** The settlement procedures in Neb. Rev. Stat. § 48-139(3) (Reissue 2010) require a worker to waive all rights under the Nebraska Workers' Compensation Act, including both the right to penalties under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012) and the right to ask a judge of the compensation court to decide the parties' rights and obligations.
10. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
11. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the Workers' Compensation Court: THOMAS E. STINE, Judge. Reversed and remanded with direction.

Charles L. Kuper, of Larson, Kuper & Wenninghoff, P.C., L.L.O., for appellants.

Rolf Edward Shasteen, of Shasteen, Miner, Scholz & Morris, P.C., L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

CASSEL, J.

## INTRODUCTION

In this workers' compensation appeal, the parties implemented a lump-sum settlement in compliance with Neb. Rev. Stat. § 48-139(3) (Reissue 2010), which dispenses with court approval. Pursuant to this statute, the worker filed a release in which he waived "all rights under the Nebraska Workers' Compensation Act" and discharged his employer from "further liability" on account of the injury. When the employer paid the lump-sum amount 42 days after the filing of the release, the worker sought and received a court order awarding a waiting-time penalty and attorney fees, from which the employer appeals. Because the worker's release waived his right to penalties and attorney fees, the order must be reversed.

## BACKGROUND

In November 2011, Bruce Holdsworth filed a petition for workers' compensation benefits alleging that he had been injured during his employment at Greenwood Farmers Cooperative. Holdsworth entered into a lump-sum settlement with Greenwood Farmers Cooperative and its workers' compensation insurance carrier (collectively appellants). Pursuant to this settlement, appellants agreed to make a one-time payment of \$20,000 "to cover any future claims for indemnity benefits and future medical treatment and to close any and all liability for the accident of March 19, 2004." At the time of

settlement, appellants had already paid for all of Holdsworth's medical expenses, temporary total disability benefits, and permanent partial disability benefits for a 27-percent loss of earning capacity. Holdsworth agreed that he was not entitled to any further temporary total disability benefits or permanent partial disability benefits.

The parties opted to use the settlement procedures adopted by the Legislature in 2009 and outlined in § 48-139(3), which did not require approval by the Workers' Compensation Court but, instead, required the filing of a release. Accordingly, Holdsworth signed a release of liability, along with his attorney, and filed it with the court on January 11, 2012. In this release, Holdsworth waived "all rights under the Nebraska Workers' Compensation Act," including the right "to ask a judge of the compensation court to decide the parties' rights and obligations." Holdsworth also agreed that appellants were "fully and completely discharged from further liability" on account of his injury.

Although not required by § 48-139(3), the parties filed a joint stipulation and motion to dismiss with prejudice. On January 12, 2012, the court issued an order dismissing Holdsworth's petition with prejudice.

Holdsworth received the settlement payment from appellants in the form of a check dated February 21, 2012. The letter mailing the check was postmarked on February 22, which was 42 days after the release had been filed. Because payment was made more than 30 days after the filing of the release, Holdsworth filed a motion with the Workers' Compensation Court to obtain a waiting-time penalty and attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012).

Appellants objected to Holdsworth's motion, arguing that § 48-125 was not applicable to settlements made under § 48-139(3). Specifically, appellants argued that when a settlement was finalized without court approval, there was no "entry of a 'final [o]rder, [a]ward, or [j]udgment'" to trigger the 30-day limitation. As for the order of dismissal, which Holdsworth had also suggested could serve as a final order for purposes of § 48-125, appellants maintained that such an order was "simply a housekeeping matter" to clear the docket,

highlighting that “no [c]ourt action is required to effectuate the settlement” executed pursuant to § 48-139(3).

On April 16, 2012, after an evidentiary hearing, the Workers’ Compensation Court entered an order granting Holdsworth’s motion for a waiting-time penalty and attorney fees. In its order, the Workers’ Compensation Court considered whether the January 12 order of dismissal was a final order for purposes of § 48-125—focusing its analysis on the definition of a final order under Neb. Rev. Stat. § 25-1902 (Reissue 2008). The court concluded that the order of dismissal was a final order because it was made during a special proceeding and affected one of Holdsworth’s substantial rights (the right to bring an action against appellants for his work-related injury). The court reached this conclusion despite a workers’ compensation decision in an earlier case in which a different judge concluded the exact opposite—that the settlement procedures of § 48-139(3) *did not* produce a final order for purposes of § 48-125.

Having determined that the order of dismissal was a final order, the Workers’ Compensation Court ruled that appellants were bound by the penalty provisions of § 48-125 and granted Holdsworth’s motion for penalties. The court ordered appellants to pay a \$10,000 waiting-time penalty and \$500 in attorney fees for failing to pay the lump-sum settlement on time.

Appellants subsequently filed a motion to modify the court’s April 16, 2012, order on the ground that there was a “reasonable controversy” over Holdsworth’s right to penalties that precluded the imposition of such penalties. They cited to *McBee v. Goodyear Tire & Rubber Co.*,<sup>1</sup> in which this court construed § 48-125 as authorizing a waiting-time penalty only “where there is no reasonable controversy regarding an employee’s claim for workers’ compensation.” Appellants argued that there was a reasonable controversy precluding the imposition of penalties because (1) the question whether penalties could be applied to settlements reached under § 48-139(3) was a question of law not yet addressed by this

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<sup>1</sup> *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 908, 587 N.W.2d 687, 692 (1999).

court and (2) judges of the Workers' Compensation Court disagreed as to whether the settlement procedure of § 48-139(3) produced a final order for purposes of § 48-125. On April 25, the Workers' Compensation Court denied appellants' motion to modify.

Appellants timely appealed both the order imposing penalties and the order denying the motion to modify. We granted appellants' petition to bypass in order to address these questions brought about by the enactment of § 48-139(3) in 2009.

### ASSIGNMENTS OF ERROR

Appellants allege, reordered and restated, that the Workers' Compensation Court erred in (1) determining that it had jurisdiction to hear the motion for penalties after Holdsworth filed a release of liability pursuant to § 48-139(3), (2) concluding that the penalty provisions of § 48-125 applied to settlements made under § 48-139(3), (3) deciding that the order of dismissal was a final order for purposes of § 48-125, (4) determining that there was no reasonable controversy to preclude the imposition of penalties, and (5) awarding Holdsworth a waiting-time penalty and attorney fees.

### STANDARD OF REVIEW

[1] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.<sup>2</sup>

[2,3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.<sup>3</sup> The meaning of a statute is also a question of law.<sup>4</sup>

### ANALYSIS

#### JURISDICTION

Appellants question the jurisdiction of the Workers' Compensation Court to consider Holdsworth's motion for penalties following the parties' settlement under § 48-139(3). Because we have the duty to determine whether the lower court

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<sup>2</sup> *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007).

<sup>3</sup> *Midwest PMS v. Olsen*, 279 Neb. 492, 778 N.W.2d 727 (2010).

<sup>4</sup> *Id.*

had the power to enter the order in question, we consider this assignment of error first.<sup>5</sup>

Appellants base their argument that the Workers' Compensation Court lacked jurisdiction solely on the fact that Holdsworth had signed a "[r]elease of [l]iability specifically waiving his right to have a judge of the compensation court decide the rights and liabilities of the parties."<sup>6</sup> This release was in accordance with the settlement procedures outlined in § 48-139(3) and therefore also stated that Holdsworth waived "all rights under the Nebraska Workers' Compensation Act." According to § 48-139(3), "[s]uch release shall be a full and complete discharge from further liability for the employer on account of the injury . . . ." Because of this language of waiver and discharge, appellants allege that upon the filing of the signed release, the Workers' Compensation Court "was divulged of jurisdiction to hear and rule on" Holdsworth's motion for penalties.<sup>7</sup> This is an incorrect conclusion.

[4-6] As this court has previously stated, "[i]t is generally elementary that: 'Jurisdiction does not relate to the right of the parties as between each other, but to the power of the court.'"<sup>8</sup> Because jurisdiction does not relate to the rights of the parties, "[p]arties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties."<sup>9</sup> Similarly, "the jurisdiction of courts is a public matter that cannot be affected by a private agreement, and the jurisdiction of a court can neither be acquired nor lost as a result of an agreement of the parties."<sup>10</sup>

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<sup>5</sup> See *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996), *limited on other grounds*, *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

<sup>6</sup> Brief for appellant at 10.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *School Dist. No. 49 v. Kreidler*, 165 Neb. 761, 771, 87 N.W.2d 429, 436 (1958) (quoting 14 Am. Jur. Courts § 161 (1938)).

<sup>9</sup> *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 638, 667 N.W.2d 538, 542 (2003).

<sup>10</sup> 20 Am. Jur. 2d Courts § 95 at 479 (2005).

Given these basic principles of jurisdiction, the parties in the instant case could not deprive the Workers' Compensation Court of jurisdiction by private agreement. It necessarily follows that Holdsworth's waiver of rights—filed pursuant to a private settlement agreement—did not deprive the court of jurisdiction to hear further issues in the case. Whether Holdsworth was entitled to bring further issues before the court is a separate matter relating to his rights under the Nebraska Workers' Compensation Act—a matter that we will discuss shortly. But whatever Holdsworth's rights, our case law recognizes that the Workers' Compensation Court had continuing jurisdiction to enforce the award of workers' compensation benefits.<sup>11</sup> This assignment of error has no merit.

WHETHER PENALTY PROVISIONS OF § 48-125  
APPLY TO SETTLEMENTS REACHED  
UNDER § 48-139(3)

Next, we must consider whether the penalty provisions of § 48-125 apply to settlements reached under the new procedures of § 48-139(3). We conclude that a worker waives his or her right to ask for penalties by filing the waiver required in § 48-139(3).

Section 48-139(3) imposes specific requirements to utilize the new settlement procedures not requiring court approval. Notably, the statute mandates that if a “lump-sum settlement is not required to be submitted for approval by the compensation court, *a release shall be filed with the compensation court in accordance with this subsection.*”<sup>12</sup> In order to protect the worker's rights, § 48-139(3) requires that the release be signed and verified by both the worker and the worker's attorney. It also mandates that the release be made on a form approved by the compensation court and that the form notify the worker of particular rights conferred by the Nebraska Workers' Compensation Act. It further requires that the release “shall contain” certain statements, including a statement that the worker “waives all rights under the Nebraska Workers’

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<sup>11</sup> See *Russell v. Kerry, Inc.*, 278 Neb. 981, 775 N.W.2d 420 (2009).

<sup>12</sup> § 48-139(3) (emphasis supplied).

Compensation Act, including, but not limited to: . . . [t]he right to ask a judge of the compensation court to decide the parties' rights and obligations."<sup>13</sup>

[7] We find no ambiguity in this language, but read it as a full waiver of any and all rights given to workers in the Nebraska Workers' Compensation Act. The statute does not qualify or limit the rights given up by the worker in the release, but states that the release is a waiver of "*all rights* under the Nebraska Workers' Compensation Act."<sup>14</sup> The Legislature also highlighted the expansiveness of the waiver by including in § 48-139(3) the words "including, but not limited to," which ensures that the waiver will not be limited only to rights specifically listed in the statute. Because we find no ambiguity, we give the statutory language of § 48-139(3) "its plain and ordinary meaning."<sup>15</sup> We "will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous."<sup>16</sup>

[8] Without doubt, the waiting-time penalty and attorney fees for waiting-time proceedings provided under § 48-125 are rights under the Nebraska Workers' Compensation Act. The broadly inclusive language of § 48-139(3) gives us no reason to believe that the rights provided by § 48-125 should be excluded from the scope of the statutory waiver.

Moreover, a worker cannot receive penalties under § 48-125 without relying upon another right explicitly waived by the release—" [t]he right to ask a judge of the compensation court to decide the parties' rights and obligations."<sup>17</sup> As § 48-125 has been interpreted by this court, there are only certain circumstances in which a worker is entitled to a waiting-time penalty.<sup>18</sup> Where the employer alleges that there was a reasonable

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (emphasis supplied).

<sup>15</sup> See *Pittman v. Western Engineering Co.*, 283 Neb. 913, 925, 813 N.W.2d 487, 496 (2012).

<sup>16</sup> *Id.*

<sup>17</sup> § 48-139(3).

<sup>18</sup> See *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009).

controversy, the worker's right to a waiting-time penalty must be decided by the Workers' Compensation Court.<sup>19</sup> And, an attorney fee may not be awarded pursuant to § 48-125(2)(a) due to a delay in paying compensation unless the worker receives an award of a waiting-time penalty. Therefore, a worker's entitlement to penalties under § 48-125 depends upon the worker's asking the court to decide both the worker's rights and the employer's obligations. But under the settlement procedure in § 48-139(3), the worker's release expressly waives this right.

[9] In summary, the settlement procedures in § 48-139(3) require a worker to waive "all rights under the Nebraska Workers' Compensation Act," including both the right to penalties under § 48-125 and "[t]he right to ask a judge of the compensation court to decide the parties' rights and obligations." Because a worker who enters into a lump-sum settlement without court approval and files a waiver in compliance with § 48-139(3) thereby waives "all" rights under the Nebraska Workers' Compensation Act, he or she also effectively waives the right to penalties under § 48-125. We agree with appellants that the penalty provisions of § 48-125 were waived by implementation of and compliance with the waiver procedures under § 48-139(3).

The partial dissent argues that the waiver required by § 48-139(3) is limited by the main paragraph of this subsection and extends only to "those liabilities that can be considered to be 'on account of the injury.'" It interprets the release statements required by § 48-139(3)(a) through (d) as implicitly incorporating this limitation.

But this interpretation reads words into § 48-139(3) that are not there. If the Legislature meant to limit the language of the release to "those liabilities that can be considered to be 'on account of the injury,'" then it would have qualified the release statement required by § 48-139(3)(a) so as to state that the worker waives only those rights under the Nebraska Workers'

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<sup>19</sup> See, e.g., *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000) (superseded by statute as stated in *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012)).

Compensation Act “on account of the injury.” But it did not. The statement of release provided by § 48-139(3)(a) would not accomplish the result urged by the dissent without this added language.

Additionally, the dissent’s interpretation ignores the plain meaning of the word “all” in the various release statements. Under its interpretation, the word “all” is meaningless, because not all rights are waived, but only the rights and obligations “on account of the injury.” Moreover, the Legislature not only said “all,” it added the phrase “including, but not limited to.”<sup>20</sup> This language cannot be reconciled with the approach urged by the dissent.

[10,11] When interpreting statutes, an appellate court will not “read into a statute a meaning that is not there.”<sup>21</sup> Additionally, “[a] court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.”<sup>22</sup> The dissent’s interpretation effectively adds language to the release statements required by § 48-139(3) and erases the clear statement in § 48-139(3)(a) that the worker waives “all” rights under the Nebraska Workers’ Compensation Act.

Furthermore, the dissent claims that our interpretation will lead to the absurd result that a worker who has reached a settlement agreement with his employer would have no means of enforcing the settlement once the release has been filed, thereby allowing an employer “to indefinitely delay payment.” Such an argument, however, ignores the reality that under § 48-139(3), the filing of a release by itself effects a discharge from liability and not actual payment, as is the case under the settlement procedures requiring court approval.<sup>23</sup> The supposedly absurd result is easily avoided by the simple expedient

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<sup>20</sup> See § 48-139(3)(a).

<sup>21</sup> *Blakely v. Lancaster County*, 284 Neb. 659, 679, 825 N.W.2d 149, 166 (2012).

<sup>22</sup> *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 846, 825 N.W.2d 173, 182 (2012).

<sup>23</sup> See § 48-139(2)(c).

of not delivering the release or stipulating to the dismissal of the case until the lump-sum payment is received. This happens every day in tort settlements, and we are not persuaded that a worker would be without a remedy where a release is fraudulently obtained.

In authorizing settlements without the protections inherent in the process of court approval, the Legislature struck a balance. Section 48-139(3) enables a worker to obtain a settlement more quickly, but in order to do so, it requires the worker to expressly waive his or her rights under the Nebraska Workers' Compensation Act. It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.<sup>24</sup> Because the language of the statute is clear and unambiguous, it is not our province to disturb the balance framed by the Legislature.

#### REMAINING ASSIGNMENTS OF ERROR

[12] Because we have concluded that Holdsworth waived his right to penalties by filing the release required by § 48-139(3), we need not consider appellants' remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.<sup>25</sup>

#### CONCLUSION

Because jurisdiction is a matter of the power of a court and not of the rights of the parties, the Workers' Compensation Court retains jurisdiction to consider additional matters following the filing of a release pursuant to the settlement procedures in § 48-139(3). However, because a worker waives all of his or her rights under the Nebraska Workers' Compensation Act, including the right to penalties under § 48-125, in such a release, a waiting-time penalty and the corresponding attorney fees cannot be imposed following a settlement reached under and implemented in compliance with

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<sup>24</sup> *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

<sup>25</sup> *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

§ 48-139(3). Accordingly, we reverse the order of the Workers' Compensation Court awarding a waiting-time penalty and attorney fees to Holdsworth, and remand the cause with direction to deny his petition for penalties.

REVERSED AND REMANDED WITH DIRECTION.

MILLER-LERMAN, J., participating on briefs.

MCCORMACK, J., concurring in part, and in part dissenting.

I disagree with the majority's determination that a non-court-approved settlement, pursuant to Neb. Rev. Stat. § 48-139(3) (Reissue 2010), waives the employee's right to a waiting-period penalty under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012). An employee does not waive his or her right to the waiting-period penalty under § 48-139(3), because the penalty is not awarded "on account of" the injury. It is awarded "on account of" the employer's failure to timely deliver payment. Accordingly, I concur with the majority's holding on subject matter jurisdiction, but respectfully dissent on the issue of the waiting-period penalty.

The majority opinion errs in holding that all rights and obligations under the Nebraska Workers' Compensation Act (the Act) are unambiguously waived under a § 48-139(3) settlement agreement. A careful reading of § 48-139(3), in its entirety, reveals the statute itself limits the scope of the waiver signed by the employee. To understand the limited scope of the waiver, it is important to view the complete provision:

(3) If such lump-sum settlement is not required to be submitted for approval by the compensation court, a release shall be filed with the compensation court in accordance with this subsection that is signed and verified by the employee and the employee's attorney. *Such release shall be a full and complete discharge from further liability for the employer on account of the injury, including future medical, surgical, or hospital expenses, unless such expenses are specifically excluded from the release.* The release shall be made on a form approved by the compensation court and shall contain a statement signed and verified by the employee that:

(a) The employee understands and waives all rights under the . . . Act, including, but not limited to:

(i) The right to receive weekly disability benefits, both temporary and permanent;

(ii) The right to receive vocational rehabilitation services;

(iii) The right to receive future medical, surgical, and hospital services as provided in section 48-120, unless such services are specifically excluded from the release; and

(iv) The right to ask a judge of the compensation court to decide the parties' rights and obligations;

(b) The employee is not eligible for medicare, is not a current medicare beneficiary, and does not have a reasonable expectation of becoming eligible for medicare within thirty months after the date the settlement is executed;

(c) There are no medical, surgical, or hospital expenses incurred for treatment of the injury which have been paid by medicaid and not reimbursed to medicaid by the employer as part of the settlement; and

(d) There are no medical, surgical, or hospital expenses incurred for treatment of the injury that will remain unpaid after the settlement.<sup>1</sup>

Read properly as a whole statute, consisting of a main paragraph, subsections, and sub-subsections, the main paragraph clearly limits the waiver to only those liabilities that can be considered to be "on account of the injury." This qualification is crucial as it indicates a clear intent by the Legislature to limit the liabilities that an employee waives in a non-court-approved settlement. In contrast, the majority opinion does not give due consideration to "on account of" and myopically focuses on subsections (3)(a) through (d) as an extensive release for the employer.

The majority opinion's decision to ignore the main paragraph is in error, because the inclusion of "on account of" by the Legislature was not by happenstance. When one reads the entirety of § 48-139, one finds that "on account of" is also used by the Legislature in § 48-139(2)(c). Section

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<sup>1</sup> § 48-139(3) (emphasis supplied).

48-139(2)(c) is the longstanding statute that enables court-approved lump-sum settlement agreements. It states in its relevant part: "Upon paying the amount approved by the compensation court, the employer (i) shall be discharged from further liability *on account of the injury* . . . ."<sup>2</sup> The placement of "on account of the injury" specifies which liability is discharged. Therefore, the inclusion by the Legislature of "on account of" in § 48-139(3) was included as an intentional limitation on the employee's release of liability.

The majority's argument is that "on account of" is not used in subsections (3)(a) through (d) and therefore is irrelevant to interpreting those subsections. Such an argument ignores our rule that when reading a statute, we must not look merely to a particular clause but must read it in connection with the whole statute.<sup>3</sup> The majority's focus on only the subsections ignores the grammatical structure of § 48-139(3).

The grammatical structure indicates that the subsections are dependent on the sentences and clauses found in the main paragraph. Subsections (a) through (d) are offset underneath the main paragraph of § 48-139(3). These subsections are dependent on the main paragraph of § 48-139(3), because the subsections would become nonsensical if the main paragraph was removed. This is first evident in the use of a colon at the end of the first paragraph, which indicates that subsections (a) through (d) are a list. Without the main paragraph, the purpose of the list would be unknown.

Second, if the subsections are read in a vacuum without the main paragraph, the release language found in subsection (3)(a), for instance, would forever waive the employee's rights under the Act. Likewise, reading subsections (3)(a) and (a)(iv), in a vacuum and without adding implied language, an employee would be prevented from seeking redress with the compensation court even if the employee is injured again in an unrelated accident. It is illogical to assume that the Legislature intended to waive every right of an employee under the Act in

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<sup>2</sup> § 48-139(2)(c) (emphasis supplied).

<sup>3</sup> See *Dada v. Mukasey*, 554 U.S. 1, 128 S. Ct. 2307, 171 L. Ed. 2d 178 (2008).

a sub-subsection, where the Legislature appears to have copied and pasted “standard form” release language. For that reason, it is necessary to understand that the grammatical structure of § 48-139(3) necessitates that the dependent subsections cannot be read without due consideration of the independent clauses found in the main paragraph.

When read in the proper context, I find that “on account of the injury” qualifies the rights, obligations, and liabilities waived by the employee throughout § 48-139(3). When the employee signs the release statement, he or she is releasing the employer from any obligation or liability that is on account of *that* injury. For instance, § 48-139(3)(a) should be understood to state that “[t]he employee understands and waives all rights [on account of the injury] under the . . . Act . . . .” Section 48-139(3)(a)(ii) should be understood as “[t]he right to receive vocational rehabilitation services [on account of the injury].” And likewise, the language relied upon heavily by the majority should be read as “[t]he employee understands and waives all rights [on account of the injury] under the . . . Act, including, but not limited to: . . . [t]he right to ask a judge of the compensation court to decide the parties’ rights and obligations [on account of the injury].”<sup>4</sup> Such readings are logical under the grammatical structure of the statute.

Having established that “on account of” qualifies the rights, obligations, and liabilities discussed in § 48-139(3), it is necessary to determine whether a waiting-period penalty is awarded “on account of the injury.” To do so, I rely on the plain meaning of “on account of,” which is defined as “for the sake of: by reason of,”<sup>5</sup> or “because of.”<sup>6</sup> Using these definitions, I find that a waiting-period penalty is not a liability by reason of or because of the employee’s injury, but, rather, is levied under § 48-125 because of or by reason of the delay in payment.

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<sup>4</sup> See § 48-139(3)(a)(iv).

<sup>5</sup> Merriam-Webster’s Collegiate Dictionary 8 (10th ed. 2001), available at <http://www.merriam-webster.com/dictionary/account>.

<sup>6</sup> Webster’s Third New International Dictionary of the English Language, Unabridged 13 (1993).

As in *O’Gilvie v. United States*,<sup>7</sup> where the U.S. Supreme Court also defined “on account of” to mean “because of,” the waiting-period penalty, like punitive damages, is not awarded “on account of the injury,” but, rather, is awarded because of the employer’s bad acts. In *O’Gilvie*, punitive damages were awarded. The issue before the Court was whether the punitive damages were excluded from gross income. “Internal Revenue Code § 104(a)(2), as it read in 1988, excluded from ‘gross income’ the ‘amount of any *damages received* (whether *by suit* or agreement and whether as lump sums or as periodic payments) *on account of personal injuries or sickness*.’”<sup>8</sup>

The Court used the dictionary definition “because of” and held that punitive damages were not received *on account of* the personal injuries, but, rather, were awarded on account of, or because of, the defendant’s conduct and the jury’s need to punish and deter such conduct.<sup>9</sup> The Court found that punitive damages “‘are not compensation for injury [but] [i]nstead . . . are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.’”<sup>10</sup> In coming to this holding, the U.S. Supreme Court rejected the petitioners’ argument that but for the personal injury, there would be no lawsuit, and but for the lawsuit, there would be no damages.

Here, as in *O’Gilvie*, the waiting-period penalty under § 48-125 is not compensation for the worker’s injury but instead is a penalty levied by the compensation court to punish the employer for failure to make prompt payment. Thus, the waiting-period *penalty* is not awarded on account of the employee’s injury, but is awarded on account of the employer’s failure to deliver timely payment.

Therefore, I believe the plain meaning of § 48-139(3), read in its entirety, is that the employee waives his or her rights under the Act that are on account of the underlying

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<sup>7</sup> *O’Gilvie v. United States*, 519 U.S. 79, 117 S. Ct. 452, 136 L. Ed. 2d 454 (1996).

<sup>8</sup> *Id.*, 519 U.S. at 81 (emphasis in original).

<sup>9</sup> *O’Gilvie v. United States*, *supra* note 7.

<sup>10</sup> *Id.*, 519 U.S. at 83.

injury. Thus, the statute does not waive the employee's right to ask the compensation court to enforce the payment of the settlement agreement through the use of a § 48-125 waiting-period penalty. Such a penalty is not awarded "on account of the injury."

I believe my plain reading of the statute is correct. However, our rules of statutory interpretation state that a statute is ambiguous if it is susceptible of more than one reasonable interpretation.<sup>11</sup> I will entertain the majority opinion as reasonable for purposes of examining the legislative history in this dissent.

When construing an ambiguous statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.<sup>12</sup>

The Legislature enacted the Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.<sup>13</sup> In light of this beneficent purpose of the Act, we have consistently given it a broad construction to carry out justly the spirit of the Act.<sup>14</sup>

To carry out the spirit of the Act, this court has liberally construed the waiting-period penalty provision in the past. Section 48-125(1)(b) states in its relevant part: "Fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the Nebraska Workers' Compensation Court . . . ." We have held that the purpose of the 30-day waiting-period penalty and the provision for attorney fees in § 48-125 is to encourage prompt payment by making delay costly if the award has

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<sup>11</sup> *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012).

<sup>12</sup> *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011).

<sup>13</sup> *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

<sup>14</sup> See *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

been finally established.<sup>15</sup> The only legitimate excuse for delay in the payment of compensation benefits is the existence of a genuine dispute from a medical or legal standpoint that any liability exists.<sup>16</sup>

To further encourage prompt payment, in *Hollandsworth v. Nebraska Partners*,<sup>17</sup> we held that the payment of a court-approved lump-sum settlement in a workers' compensation case is subject to a waiting-period penalty under § 48-125. We noted that because a delay in payment to the employee results when a case is contested, the disabled worker's need for the prompt payment of benefits is especially urgent after a final adjudicated award.<sup>18</sup> In such instances, the employee has had to do without a weekly stipend for a longer period than when an employer does not contest the worker's right to benefits.<sup>19</sup> Thus, it is important to discourage unnecessary delay in the payment of a court-approved settlement agreement.<sup>20</sup>

In addition, the legislative history of § 48-139(3)—which was introduced after our opinion in *Hollandsworth*—reaffirms the importance of discouraging unnecessary delay in the payment of a settlement agreement under that section. The bill's introducer stated she “introduced this bill as a way to help injured employees received [sic] their benefits more quickly.”<sup>21</sup> She went on to explain to the Business and Labor Committee that the purpose of the legislation was to expedite payments from the employer to the employee, stating:

[T]he general purpose behind this legislation, it is really about efficiency. When an injured person is fully represented by competent counsel [and] both parties have

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<sup>15</sup> *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998).

<sup>16</sup> *Id.*

<sup>17</sup> *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Public Hearing, L.B. 194, Business and Labor Committee, 101st Leg., 1st Sess. 1 (Feb. 9, 2009).

been able to reach agreement on what would be an appropriate settlement and that injured worker is waiting, many times in dire circumstances without income coming in and their [sic] receiving, for example, notifications that maybe their [sic] utilities might be turned off and they [sic] have no resources available to them [sic] until the settlement is granted. So by erasing the undue burden that this additional administrative step could impose, it just seeks to improve efficiency within the system.<sup>22</sup>

The legislative history demonstrates that the statute was not intended, and should not be interpreted, to waive every employee right under the Act. Rather, the statute's intention is to expedite payment.

To be consistent with the legislative history, we should reject the majority opinion, because its interpretation allows an employer to indefinitely delay payment. This is because the majority interpretation prevents Holdsworth from asking the compensation court to enforce the settlement agreement he signed with his employer. That would be asking the compensation court to decide the parties' rights and obligations concerning the settlement agreement. It gets worse. Under the majority opinion, Holdsworth could not file a separate cause of action in a Nebraska district court, or any court, because the compensation court has exclusive subject matter jurisdiction over § 48-139(3) settlement agreements.<sup>23</sup> It is unclear how an employee would be able, if at all, to force the employer to make payment.

An interpretation that allows for an indefinite delay of payment is an absurd result. In *Soto v. State*,<sup>24</sup> we held that we should never interpret a provision of the Act in a manner that creates a circumstance whereby an employer could indefinitely delay payment of a portion of a workers' compensation judgment without penalty. The majority opinion does just that.

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<sup>22</sup> *Id.*

<sup>23</sup> See *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989).

<sup>24</sup> *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on denial of rehearing* 270 Neb. 40, 699 N.W.2d 819.

In response, the majority opinion argues that the “supposedly absurd result is easily avoided by the simple expedient of not delivering the release or stipulating to the dismissal of the case until the lump-sum payment is received.” This ignores the realities of this case and the realities discussed by both of the parties’ attorneys during oral argument. In this instance, Holdsworth’s experienced workers’ compensation attorney did not demand that the insurance company pay before having his client sign the release agreement. During oral argument, the employer’s attorney acknowledged that it was common practice for the release to be filed prior to payment. He attributed this to the practice of receiving court approval of a signed settlement agreement reached under § 48-139(2)(c) before payment. Likewise, Holdsworth’s attorney agreed with opposing counsel and argued during oral argument that in his experience, an insurance company would not issue a check prior to a signed release statement. Although both attorneys did acknowledge that, in theory, payment and signing of the release could happen simultaneously, neither attorney was willing to endorse it as practical. Either way, in the world of the majority opinion, an employee will have to require payment before signing the release statement—a practice insurance companies may not be willing to accommodate. Thus, non-court-approved settlements will risk falling out of favor, defeating the statute’s purpose of expediting payment.

My interpretation of § 48-139(3), which encourages prompt payment by allowing waiting-period penalties, is consistent with the legislative history of § 48-139(3) and with the beneficent purpose of the Act. This court should continue to recognize the necessity of enforcing timely payment by allowing the waiting-period penalty to apply to this settlement agreement.

Because a waiting-period penalty can be awarded to non-court-approved settlements, we must determine whether the facts of this case meet the requirements for awarding the penalty under § 48-125. The compensation court’s dismissal in this case was a final adjudicated order under our precedent in *Hollandsworth*, and the payment was due within

30 days of the dismissal order.<sup>25</sup> Payment was received by Holdsworth 42 days after the compensation court dismissed his claim pursuant to the settlement agreement. There can be no legal or medical dispute over liability, because the parties had reached an agreement for payment. Therefore, the employer's failure to promptly pay is not excused, and the award was proper.

I respectfully dissent from the majority opinion's conclusion that an employee waives his or her right to a waiting-period penalty when reaching a non-court-approved settlement pursuant to § 48-139(3). Accordingly, I would affirm the compensation court's decision to grant Holdsworth's motion for penalties.

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<sup>25</sup> See *Hollandsworth v. Nebraska Partners*, *supra* note 17.

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STATE OF NEBRASKA EX REL. COMMISSION ON  
UNAUTHORIZED PRACTICE OF LAW, RELATOR,  
v. PAUL J. HANSEN, RESPONDENT.

834 N.W.2d 793

Filed June 14, 2013. No. S-12-475.

1. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court has the inherent power to define and regulate the practice of law and is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law.
2. \_\_\_\_: \_\_\_\_\_. The inherent power of the Nebraska Supreme Court to define and regulate the practice of law includes the power to prevent persons who are not attorneys admitted to practice in this state from engaging in the practice of law.
3. **Attorney and Client: Actions.** A legal proceeding in which a party is represented by a person not admitted to practice law is considered a nullity and is subject to dismissal.
4. **Rules of the Supreme Court: Attorneys at Law.** Pursuant to its inherent authority to define and regulate the practice of law in Nebraska, the Nebraska Supreme Court has adopted rules specifically addressed to the unauthorized practice of law. The purpose of the rules is to protect the public from potential harm caused by the actions of nonlawyers engaging in the unauthorized practice of law.

Original action. Injunction issued.

Sean J. Brennan, Special Prosecutor, for relator.

Paul J. Hansen, pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

### NATURE OF CASE

This is an original action brought by the Nebraska Supreme Court Commission on Unauthorized Practice of Law (Commission) to enjoin Paul J. Hansen from engaging in the unauthorized practice of law.

### BACKGROUND

In November 2011, the Commission received a complaint from legal counsel for the Nebraska State Patrol alleging that Hansen was engaged in the unauthorized practice of law. The complaint alleged that Hansen was “maintaining a website selling presentations on filing evictions and common law l[ie]ns” and that Hansen was “holding himself out as a lawyer and counsel, but not as an attorney.” After an investigation, the Commission found that Hansen was not a lawyer and that he had engaged in the practice of law as defined by Neb. Ct. R. § 3-1001(A) and (B). Specifically, the Commission found that Hansen “has a webpage that offers the public ‘eviction kits’ for \$35 and ‘common law liens’ for \$25.” The Commission also noted “[t]here may be more violations that exist . . . .”

The Commission mailed a certified letter dated February 23, 2012, to Hansen at his Omaha, Nebraska, address, directing him to contact the Commission and to cease and desist from engaging in the unauthorized practice of law. Copies of the Commission’s written findings and this court’s rules governing the unauthorized practice of law were enclosed with this letter. When the letter was returned unclaimed, the Commission arranged for it to be personally served on Hansen at his Omaha address by the Douglas County sheriff’s office. Personal service on Hansen occurred on April 2 at the Omaha address shown on his Web site.

Several days later, the Commission received a written response purportedly signed by Hansen and bearing the Omaha address at which he was served. The response referred to the Commission's letter of February 23, 2012, and included the following statements, which we quote verbatim including grammatical, typographical, and spelling errors:

1. I have never represented, in any way, in the jurisdiction of the United States (Land 'of' the United States.

2. Any material conveyed/shared by me is done without the United States. Done on land not 'of' the United States.

3. It is my understanding United States Promulgated Court Rules are without force and effect outside of the said Jurisdiction of the United States.

4. No material I share is know to be intentionally shipped into a United States possession. If I am using a medium to convey information by a United States possession please inform me of this fact so that I may alter the rout.

5. I have never in time past held a license / association with/by a state Bar License.

6. Does your office consider land not owned by the United States the jurisdiction of the United States as to Statute 3-1001(A)(B)?

On May 30, 2012, the Commission filed a petition for injunctive relief pursuant to Neb. Ct. R. § 3-1015. The petition alleged that Hansen had been engaging in the unauthorized practice of law from October 25, 2010, to the present in the following particulars:

(A) [Hansen] has been and is giving advice or counsel, direct or indirect, to other persons as to the legal rights of those persons, where a relationship of trust or reliance exists between [Hansen] and the persons to which such advice or counsel is given;

(B) [Hansen] has engaged in selecting, drafting, completing, and/or filing, for other persons, legal documents which affect the legal rights of those persons;

(C) [Hansen] created and maintains a webpage at [www.pauljjhansen.com](http://www.pauljjhansen.com), on which he sells a "Do-It-Yourself eviction kit" and a "Common Law Lien kit."

He also blogs and responds to questions posted on that webpage by giving legal advice.

(D) [Hansen] is not licensed to practice law in the state of Nebraska and thus, is unauthorized to engage in the conduct referred to herein.

The petition further alleged that the Commission had served Hansen with its findings and a request to cease and desist, but that he had not agreed to do so. The petition alleged that the Commission had no adequate remedy at law and prayed that this court invoke the procedures set forth in § 3-1015(C) through (F) and issue a civil injunction enjoining Hansen from engaging in the unauthorized practice of law. Upon the filing of the petition, we granted the Commission's motion for appointment of counsel to represent it in the proceeding due to the fact that its counsel had conducted the investigation and would appear as a witness.

Hansen was personally served with a copy of the petition and summons at his Omaha address on June 21, 2012. On July 2, he filed a pleading captioned "Foreign Plea in Abatement." Because pleas in abatement are not provided for in civil actions,<sup>1</sup> this court found the pleading to be improper and ordered it stricken from the record. Hansen also filed a "Memorandum of Fact, Agreement, and Law, in Affidavit form- Case No. S-12-475" on July 2. This court deemed it to constitute an answer pursuant to § 3-1015(C). In this answer, Hansen alleged that he is a "free inhabitant" who claims independence from the United States and its written laws and is not subject to the jurisdiction of the United States or the State of Nebraska. Because the answer raised disputed questions of material fact, we appointed a hearing master pursuant to § 3-1015(F) to conduct proceedings in accordance with Neb. Ct. R. § 3-1016.

The hearing master conducted an evidentiary hearing which commenced on November 12, 2012, and was continued to December 27, when it concluded. Hansen received notice of the hearing but did not appear. Evidence received at the

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<sup>1</sup> Neb. Rev. Stat. § 25-801.01 (Reissue 2008).

hearing included an Internet posting dated January 12, 2012, in which Hansen provided his location as “Omaha, NE” and stated: “I am a ‘common law’ Lawyer. I counsel clients all over America and a few in foreign countries, vi [sic] internet.” There was also evidence that when a telephone call was placed to Hansen’s office on November 8, 2012, a recorded message stated: “You have reached the law office of Paul Hansen. Leave your name, number, best time to call you, your time zone, and email if you are a client.” There was also evidence that Hansen’s Internet postings included information about his hourly rates.

The hearing master filed a report on February 7, 2013. He found that Hansen is not a licensed Nebraska lawyer and that Hansen “is and was holding himself out as a regular attorney practitioner in the State of Nebraska.” The hearing master thus found “by clear and convincing evidence that . . . Hansen has engaged and is engaged in the unauthorized practice of law contrary to Nebraska law and the rules of the Nebraska Supreme Court.” On the basis of this finding, he recommended that an injunction be issued.

On March 20, 2013, this court entered an order directing that copies of the hearing master’s report and recommendation be mailed to all parties. The order established deadlines for filing exceptions to the hearing master’s report and for filing supporting briefs pursuant to Neb. Ct. R. § 3-1017(B). No exceptions or briefs were filed by either party. On April 24, this court entered an order advising the parties that the matter would be deemed submitted as of May 6, in the absence of objection by either party. No objections were filed.

### DISPOSITION

[1-3] This court has the inherent power to define and regulate the practice of law and is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law.<sup>2</sup> This includes the power to prevent persons

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<sup>2</sup> *State ex rel. Comm. on Unauth. Prac. of Law v. Tyler*, 283 Neb. 736, 811 N.W.2d 678 (2012).

who are not attorneys admitted to practice in this state from engaging in the practice of law.<sup>3</sup> A legal proceeding in which a party is represented by a person not admitted to practice law is considered a nullity and is subject to dismissal.<sup>4</sup> This is not for the benefit of lawyers admitted to practice in this state, but ““““for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other . . . .””””<sup>5</sup>

[4] Pursuant to our inherent authority to define and regulate the practice of law in Nebraska, this court has adopted rules specifically addressed to the unauthorized practice of law.<sup>6</sup> The purpose of the rules is to protect the public from potential harm caused by the actions of nonlawyers engaging in the unauthorized practice of law.<sup>7</sup> At the core of these rules is a general prohibition: “No nonlawyer shall engage in the practice of law in Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice law in Nebraska except as may be authorized by published opinion or court rule.”<sup>8</sup> “Nonlawyer” is defined by the rules as “any person not duly licensed or otherwise authorized to practice law in the State of Nebraska,” including “any entity or organization not authorized to practice law by specific rule of the Supreme Court whether or not it employs persons who are licensed to practice law.”<sup>9</sup> Based on our de novo review of the record and pursuant to § 3-1018, we adopt the finding of the hearing master that Hansen is not licensed or authorized to practice law in

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 739-40, 811 N.W.2d at 681, quoting *State ex rel. Comm. on Unauth. Prac. of Law v. Yah*, 281 Neb. 383, 796 N.W.2d 189 (2011), quoting *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957).

<sup>6</sup> See Neb. Ct. R. §§ 3-1001 to 3-1021 (rev. 2008).

<sup>7</sup> *Id.*, Statement of Intent.

<sup>8</sup> § 3-1003.

<sup>9</sup> § 3-1002(A).

Nebraska and is therefore a “nonlawyer” within the meaning of our rules.

The question, then, is whether Hansen, as a nonlawyer, has engaged in the “practice of law,” which is defined by § 3-1001 as follows:

The “practice of law,” or “to practice law,” is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer. This includes, but is not limited to, the following:

(A) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.

(C) Representation of another entity or person in a court, in a formal administrative adjudicative proceeding or other formal dispute resolution process, or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(D) Negotiation of legal rights or responsibilities on behalf of another entity or person.

(E) Holding oneself out to another as being entitled to practice law as defined herein.

In its petition for injunctive relief, the Commission alleged that Hansen had engaged in the conduct described in § 3-1001(A) and (B). The hearing master did not make a specific finding that Hansen had given legal advice or counsel to any person or entity with whom he had a relationship of trust or reliance. Nor did he specifically find that Hansen had selected, drafted, or completed legal documents for any specific person. Based upon our de novo review of the record, we find insufficient evidence to show that Hansen engaged in

the unauthorized practice of law as defined by § 3-1001(A) and (B). The evidence does support an inference that Hansen sold certain forms from his Web site, including “common law liens” and an “eviction package.” But our unauthorized practice of law rules do not prohibit “[n]onlawyers selling legal forms in any format, so long as they do not advise or counsel another regarding the selection, use, or legal effect of the forms.”<sup>10</sup> Although the evidence in this record suggests that Hansen is counseling others regarding the use of his forms, it is insufficient for us to conclude that he has actually done so in Nebraska. In this regard, we note that counsel for the Commission requested and received a continuance of the hearing in order to obtain evidence identifying “clients” who had retained Hansen, but later advised the hearing master that he had been unable to obtain such evidence.

But the evidence in the record fully supports the finding of the hearing master that Hansen “is and was holding himself out as a regular attorney practitioner in the State of Nebraska.” On his Web site and other Internet postings, Hansen identifies himself as a “Lawyer/Counsel without the United States,” a “‘common law’ Lawyer,” and “Legal Counsel.” When a call is placed to his telephone number within area code 402, a recorded message states that the caller has reached “the law office of Paul Hansen.” We agree with the finding of the hearing master that “the unsophisticated potential client, reading . . . Hansen’s proffered literature and viewing his statements on the internet, and corresponding with him, would believe that . . . Hansen is licensed to practice law in Nebraska and capable of giving sound legal advice.”

From his response to the Commission’s letter informing him of its findings and his filings in this court, it appears that Hansen believes that he is not subject to state law and is free to practice law without a license so long as he does so on “land not owned by the United States.” He is mistaken.

We adopt the findings of the hearing master that Hansen has held himself out as a lawyer authorized to practice in Nebraska and that he continues to do so. This constitutes the

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<sup>10</sup> § 3-1004(G).

unauthorized practice of law under the definition set forth in § 3-1001(E) and falls within the general prohibition of § 3-1003 applicable to nonlawyers such as Hansen. Although the Commission did not specifically allege in its petition that Hansen was engaged in the unauthorized practice of law by holding himself out as being authorized to practice law, that fact is implicit in its allegations that Hansen had been giving legal advice to others. And we note that despite having an opportunity to do so, Hansen did not file exceptions to the finding of the hearing master that he “is and was holding himself out as a regular attorney practitioner in the State of Nebraska,” nor did he assert that such finding was not within the scope of this proceeding. We conclude that Hansen’s conduct is deceptive and poses the type of risk of harm to the public that our unauthorized practice rules are intended to prevent.

Accordingly, by separate order entered on June 14, 2013, Hansen is enjoined from engaging in the unauthorized practice of law in any manner, including but not limited to holding himself out to another as being entitled to practice law as defined by § 3-1001.

INJUNCTION ISSUED.

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STATE OF NEBRASKA, APPELLEE, v. SAMUEL Q. SMITH, APPELLANT.  
834 N.W.2d 799

Filed June 14, 2013. No. S-12-966.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court’s determination.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Actions: Time.** When the period within which an act is to be done in any action or proceeding is given in terms of months or years, the last day of the period is the appropriate anniversary of the triggering act or event, unless that anniversary falls on a Saturday, Sunday, or court holiday.
4. **Records: Time: Evidence: Presumptions.** The entry of filing by the clerk is the best evidence of the date of filing and is presumed to be correct until the contrary is shown.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Affirmed.

Samuel Q. Smith, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

### I. NATURE OF CASE

Samuel Q. Smith appeals from the district court's denial of his motion for postconviction relief without an evidentiary hearing. The court determined the action was barred by Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2012). We affirm.

### II. SCOPE OF REVIEW

[1] Statutory interpretation presents a question of law, which we review independently of the lower court's determination. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013).

### III. FACTS

In April 2003, Robert Chromy chased Smith and two other shoplifters from a gas station and tried to keep them from leaving the scene. See *State v. Smith*, 13 Neb. App. 404, 693 N.W.2d 587 (2005). During this attempt, Smith shot and killed Chromy. Smith was charged with second degree murder and use of a deadly weapon to commit a felony. The jury convicted him of both counts. He was sentenced to 40 to 60 years' imprisonment for second degree murder and 5 to 10 years' imprisonment for use of a deadly weapon to commit a felony. The sentences were to be served consecutively with credit for 391 days served. The Nebraska Court of Appeals affirmed Smith's convictions and sentences, and on April 27, 2005, this court denied further review.

In 2011, the Nebraska Legislature enacted L.B. 137, which amended the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2008 & Cum. Supp. 2012). See 2011 Neb. Laws, L.B. 137, § 1. The amendment created a 1-year time limit for filing a verified motion for postconviction relief. The 1-year period runs from the appropriate triggering event or August 27, 2011, whichever is later. See, L.B. 137, § 1; § 29-3001(4) (Cum. Supp. 2012).

Smith filed the instant pro se action for postconviction relief. He alleges that he filed the motion on August 24, 2012, and that his motion was timely filed under the “prison delivery rule.” The motion was file stamped by the clerk of the district court for Douglas County, Nebraska, on August 28, 2012. Smith claims his motion was signed and notarized on August 24, which was a Friday, and that the next mailing day available to him was Monday, August 27. He claims the fact that his motion was received on August 28 is evidence that he mailed the motion on or before August 27.

The district court concluded Smith had until 1 year from August 27, 2011, to file his motion. It noted that Nebraska does not have a prison delivery rule. The court determined that the motion, file stamped on August 28, 2012, was filed outside the 1-year period described in § 29-3001(4) and that Smith’s postconviction action was barred by the limitation period pursuant to § 29-3001(4). It denied the motion without an evidentiary hearing, and Smith appealed. Pursuant to statutory authority, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

#### IV. ASSIGNMENT OF ERROR

Smith assigns, restated, that the district court erred in denying postconviction relief without an evidentiary hearing.

#### V. ANALYSIS

##### 1. § 29-3001(4)

The question is whether Smith timely filed his motion for postconviction relief. Section 29-3001(4) states, in relevant part:

A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:

(a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;

.....

(e) August 27, 2011.

Smith's convictions became final when his direct appeal concluded with this court's denial of his petition for further review on April 27, 2005, several years before August 27, 2011. See § 29-3001(4)(a). Since August 27, 2011, is later than the date Smith's judgments of conviction became final, the 1-year period in § 29-3001(4) began to run on August 27, 2011, and expired on August 27, 2012.

[3] Unless the context is shown to intend otherwise, the word "year" in a Nebraska statute means a "calendar year." See Neb. Rev. Stat. § 49-801(25) (Reissue 2010). In *Licht v. Association Servs., Inc.*, 236 Neb. 616, 463 N.W.2d 566 (1990), we determined that a 2-year period beginning on April 4, 1986, expired on April 4, 1988. In application, when the period is given in terms of months or years, the last day of the period is the appropriate anniversary of the triggering act or event, unless that anniversary falls on a Saturday, Sunday, or court holiday. *Id.*

Because the 1-year period for Smith's postconviction motion began to run on August 27, 2011, it expired on the 1-year anniversary of that date, Monday, August 27, 2012. Smith's motion was file stamped on August 28, 2012, 1 day after the 1-year period expired.

## 2. FILING BY MAIL

### (a) Prison Delivery Rule

Smith contends he filed his motion on August 24, 2012. He asserts that the district court abused its discretion by disregarding the prison delivery rule set forth in *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988). In *Houston*, the prisoner delivered his notice of appeal to prison authorities for mailing to the district court within the 30-day

time period mandated by 28 U.S.C. § 2107 (1988). His notice of appeal was not stamped “filed” by the district court until 1 day after the required filing period. The U.S. Supreme Court held that the notice was timely filed. It concluded that a prisoner acting pro se “files” a notice of appeal on the date it is delivered to prison authorities for forwarding to the clerk of the district court. The Court noted that a pro se prisoner litigant cannot travel to the courthouse, but has to rely on prison authorities, who may have a reason to delay the filing.

The State argues Smith’s motion was filed on August 28, 2012, as shown by the filing stamp of the clerk of the district court. It claims there is no evidence that Smith placed his motion in the mail on August 24. It admits Smith signed the motion on August 24 but asserts that the date the motion was signed is not controlling. The State claims that Nebraska courts have declined to adopt a prison delivery rule.

In *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998), we rejected the prison delivery rule. After we affirmed both his conviction for murder and the denial of his first postconviction motion, LeRoy J. Parmar filed a pro se motion for postconviction relief. The district court denied the motion. We dismissed the appeal because Parmar had not timely perfected it. The postconviction appeal presented the question whether a prisoner’s pro se poverty affidavit, which was necessary to perfect the appeal, was filed on the date it was delivered to prison authorities for mailing rather than the date it was received in the office of the clerk of the district court. Because the notice of appeal and the poverty affidavit were received in the clerk of the district court’s office more than 30 days after the rendition of the judgment, we were without jurisdiction to consider the appeal. Parmar argued that his pro se notice of appeal and poverty affidavit were timely filed under the prison delivery rule announced in *Houston v. Lack*, *supra*.

We distinguished Nebraska’s filing requirements in Neb. Rev. Stat. § 25-1912 (Reissue 1995) from 28 U.S.C. § 2107 (1994). Section 25-1912 required an appeal to be filed in the office of the clerk of the district court, and we could not construe “in the office of” to mean “in the hands of prison

authorities for forwarding to the office of.’” See *State v. Parmar*, 255 Neb. at 362, 586 N.W.2d at 283. To say we had jurisdiction based on anything other than the plain words of the statute would have been the equivalent of judicial legislation. *Id.* We continue to hold that the prison delivery rule does not apply in Nebraska.

(b) § 49-1201

Smith relies on Neb. Rev. Stat. § 49-1201 (Reissue 2010), which provides for a presumption of mailing “if the sender establishes by competent evidence that the report, claim, tax return, tax valuation, equalization, or exemption protest, or tax form, petition, appeal, or statement, or payment was deposited in the United States mail on or before the date for filing or paying.” Smith alleges he has provided evidence of mailing through the signature and notarization on his motion for post-conviction relief, which are dated August 24, 2012. He asserts that August 24 was a Friday; that all institutional mail would not leave the institution until the next Monday, August 27; and that the fact that the clerk of the district court’s office received the motion on August 28 was competent evidence he mailed the motion on or before August 27.

Statutory interpretation presents a question of law, which we review independently of the lower court’s determination. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013). Smith’s reliance on § 49-1201 is misplaced. This court has not applied § 49-1201 to postconviction actions. Section 49-1201 relates to tax matters and is inapplicable in postconviction actions.

Words grouped in a list should be given related meaning. See *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). The terms “tax return,” “tax valuation,” “equalization,” “exemption protest,” “tax form,” “petition,” “appeal,” “statement,” and “payment” relate to tax matters. Giving the words “report” and “claim” a related meaning excludes a motion for postconviction relief from coverage under § 49-1201. Section 49-1201 does not apply to Smith’s motion.

[4] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the

district court will not be disturbed unless they are clearly erroneous. *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013). “The entry of filing by the clerk is the best evidence of the date of filing and is presumed to be correct until the contrary is shown.” *State v. Hess*, 261 Neb. 368, 377-78, 622 N.W.2d 891, 901 (2001). The district court’s finding that Smith filed his motion outside the 1-year period was not clearly erroneous.

## VI. CONCLUSION

The district court did not err in denying postconviction relief without an evidentiary hearing. We affirm the judgment of the district court.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, v. JAMES L. BRANCH, APPELLANT.  
834 N.W.2d 604

Filed June 14, 2013. No. S-12-1010.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from post-conviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Constitutional Law: Judgments: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant’s rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
3. **Postconviction.** An evidentiary hearing is not required when a motion for post-conviction relief alleges only conclusions of fact or law.
4. **Postconviction: Constitutional Law: Judgments: Proof.** If a defendant makes sufficient allegations of a constitutional violation which would render a judgment void or voidable, an evidentiary hearing on a motion for postconviction relief may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, STEPHAN, McCORMACK, and CASSEL, JJ.

HEAVICAN, C.J.

### INTRODUCTION

James L. Branch's motion for postconviction relief was denied without an evidentiary hearing. He appeals. We conclude that Branch is entitled to an evidentiary hearing on his allegation regarding potential alibi evidence and accordingly reverse the district court's denial of a hearing. As to Branch's other allegations, however, we affirm the district court's judgment.

### BACKGROUND

In March 2008, Branch was charged by amended information with robbery, first degree false imprisonment, and kidnapping. At his jury trial, Branch testified in his own behalf that he was not present during the alleged crimes. Following the conclusion of his trial, Branch was convicted of robbery and kidnapping, and the false imprisonment charge was dismissed. He was sentenced to 40 to 50 years' imprisonment for robbery and life imprisonment for kidnapping; this court affirmed.<sup>1</sup>

In April 2011, Branch filed a pro se motion for postconviction relief. He was appointed counsel, and an amended motion for postconviction relief was filed. That motion alleged that trial and appellate counsel were the same and that this counsel was ineffective as follows:

- a. Trial counsel was aware [Branch] claimed not to be present during the incident and did not commit the crimes charged but failed to call witnesses on [Branch's] behalf, such as Laqu[e]sha Martin, who would testify [Branch]

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<sup>1</sup> *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

was not present during the incident and did not commit the crimes charged;

b. Trial counsel failed to use an investigator to discover additional witnesses and/or evidence that tended to establish that [Branch] was not present during the incident and did not commit the crimes charged even though [Branch] provided trial counsel with information in this regard;

c. Trial counsel knew there were latent fingerprints from the crime scene, but did not request for independent scientific evaluation of any and all lifts of latent fingerprints;

d. Trial counsel knew there was blood or suspected blood samples, but did not request for independent scientific evaluation of any and all blood or suspected blood samples; and

e. Trial counsel failed to consult with [Branch] regarding critical aspects of the case, e.g., calling or not calling witnesses vital to the defense, theory of the defense, and final argument.

Branch further alleged that he was prejudiced by this deficient performance because:

a. The lack of additional defense witnesses and expert testimony regarding the physical evidence unfairly prejudiced the jury against [Branch] and his theory of defense;

b. Consultation with [Branch] regarding potential defense witnesses, expert testimony, and trial strategy would have resulted in a stronger defense at trial and would have produced a different result at trial; and

c. There is a reasonable probability that but for trial counsel's deficient performance the results of the trial would have been different.

The district court denied Branch's motion without an evidentiary hearing. Branch appeals.

#### ASSIGNMENT OF ERROR

Branch assigns that the district court erred in failing to grant an evidentiary hearing on his motion for postconviction relief.

### STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.<sup>2</sup>

### ANALYSIS

[2-4] In his sole assignment of error, Branch asserts that the district court erred in failing to grant him an evidentiary hearing. An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.<sup>3</sup> An evidentiary hearing is not required when the motion alleges only conclusions of fact or law.<sup>4</sup> If the defendant makes sufficient allegations of a constitutional violation which would render the judgment void or voidable, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.<sup>5</sup>

#### *Alibi Testimony.*

We turn first to Branch's argument that the district court erred in failing to grant an evidentiary hearing on his allegation that his trial counsel was ineffective for failing to present alibi evidence in the form of Laquesha Martin's testimony.

As is set forth above, Branch alleged that trial counsel was aware of Branch's alibi defense and further alleged that Martin would testify that Branch was not present during the incident and did not commit the crimes charged. Standing alone, these allegations are insufficient to support the granting of an

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<sup>2</sup> *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

<sup>3</sup> *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

evidentiary hearing, because they do not specifically allege that Martin would provide an alibi for Branch.

Given the restrictions of the Nebraska Postconviction Act,<sup>6</sup> those seeking postconviction relief ought to plead any and all allegations with as much detail as possible in order to avoid the dismissal of their motion without an evidentiary hearing. But in this case, an otherwise vague allegation is made sufficiently clear upon review of the record.

At trial, Branch testified in his own behalf. In that testimony, Branch stated that on the date of the robbery, he was asleep until just prior to either 11 a.m. or 2 p.m., at which time he picked up Martin from work. Branch explained that he was uncertain about the time because Martin had been working a lot of overtime and he was unsure about whether she worked overtime on that day. In any event, Branch testified that after he picked Martin up, he and Martin drove to the home of a friend of Branch's who was keeping Branch's dog. Branch estimated that they were gone about 1½ hours before returning to the apartment they shared. Upon returning to their apartment, the two met with Paul Miller. Miller had in his possession a credit card, and he asked Branch if he would go around town with Miller and fill up gas tanks. We note that this timeline, while vague, is not obviously inconsistent with the victim's testimony regarding the robbery, which is also somewhat vague.

When the allegations regarding Martin's proposed testimony are considered in conjunction with Branch's trial testimony, they are sufficient to warrant the granting of an evidentiary hearing. The allegations in Branch's motion state that Martin would testify that Branch was not present during the incident and did not commit the crimes charged. And Branch testified that he was with Martin. A logical reading of both suggests that Martin would testify that Branch was not present and did not commit the crimes charged because he was with Martin. As such, Branch is entitled to an evidentiary hearing on this allegation.

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<sup>6</sup> Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012).

*Remaining Allegations.*

Branch also alleges that his counsel was ineffective for failing to use an investigator to discover additional witnesses, for failing to consult with Branch on critical aspects of the case, and for failing to order independent testing of fingerprint and blood evidence.

While Branch is entitled to an evidentiary hearing on the question of the ineffectiveness of his trial counsel with regard to a potential alibi witness, the remainder of his allegations are merely conclusory and insufficient to warrant postconviction relief. Branch fails to allege what other witnesses might be called or what their testimony might be. In addition, he fails to allege what specifically would have been different about these “critical aspects of the case” if only he had been consulted by trial counsel. And Branch fails to set forth any prejudice that would result from independent analyses of fingerprint and blood evidence when nothing at trial suggested that this evidence in any way implicated Branch, and where there were other perpetrators of the crimes in addition to Branch. Thus, Branch is not entitled to an evidentiary hearing on these allegations.

### CONCLUSION

We reverse the district court’s denial of Branch’s request for an evidentiary hearing regarding trial counsel’s alleged ineffectiveness in failing to present Martin’s alibi testimony. We otherwise affirm the denial of Branch’s request. The judgment of the district court is affirmed in part and in part reversed, and the cause remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND  
REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY and MILLER-LERMAN, JJ., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.  
DAVID C. PHELPS, APPELLANT.  
834 N.W.2d 786

Filed June 14, 2013. No. S-12-1021.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
4. **Postconviction.** Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief.
5. \_\_\_\_\_. The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
6. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
7. **Postconviction.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable.
8. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
9. \_\_\_\_\_. \_\_\_\_\_. \_\_\_\_\_. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
10. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
11. **Postconviction: Motions for New Trial: Time: Evidence.** A motion for postconviction relief cannot be used to obtain, outside of the 3-year time limitation under Neb. Rev. Stat. § 29-2103 (Reissue 2008), what is essentially a new trial based on newly discovered evidence.
12. **Postconviction: Right to Counsel.** Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether to appoint counsel to represent the defendant.

13. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.**

When the defendant's petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel. Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Affirmed.

Melissa A. Wentling, Madison County Public Defender, and Kyle Melia for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and CASSEL, JJ., and IRWIN, Judge.

STEPHAN, J.

David C. Phelps appeals from an order finding his motion for postconviction relief should be denied without an evidentiary hearing. Because we conclude that Phelps' motion failed to allege sufficient facts which, if proved, would entitle him to postconviction relief, we affirm the judgment of the district court.

### BACKGROUND

Phelps was convicted of kidnapping in the 1987 disappearance of 9-year-old Jill Cutshall, and he was sentenced to life imprisonment. We affirmed his conviction and sentence in 1992.<sup>1</sup> In 2012, Phelps filed the underlying motion for postconviction relief in the district court for Madison County. The motion alleged that he had just recently learned of the existence of newly discovered evidence in the form of a diary. Phelps alleged that the diary had "disturbingly graphic detail of the abduction, rape, and murder of four women at [a] farm near Chambers, Nebraska," and that Cutshall was one of the

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<sup>1</sup> *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

four victims. Phelps alleged that the diary was in the possession of the Valley County Attorney or the Nebraska Attorney General and that it was “only given to authorities” around March 7.

The district court denied postconviction relief. It reasoned that Phelps had not alleged any facts related to the abduction, rape, or murder of Cutshall and that thus, it was not necessary to conduct an evidentiary hearing. The court also found that to the extent Phelps’ motion sought a new trial, it was improper because it was filed more than 3 years after the verdict.<sup>2</sup> In addition, the court found that the postconviction motion was procedurally barred by Phelps’ two previous postconviction requests, which were both denied. Phelps filed this timely appeal.

### ASSIGNMENTS OF ERROR

Phelps assigns as error the district court’s determination that his postconviction motion was procedurally barred and that it did not contain sufficiently specific factual allegations to require an evidentiary hearing. He also assigns that the district court abused its discretion in denying his request for the appointment of postconviction counsel.

### STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.<sup>3</sup>

[2,3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.<sup>4</sup> When reviewing questions of law, an appellate court resolves the questions independently of the lower court’s conclusion.<sup>5</sup>

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<sup>2</sup> Neb. Rev. Stat. §§ 29-2101(5) and 29-2103(4) (Reissue 2008).

<sup>3</sup> *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

<sup>4</sup> *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012); *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

<sup>5</sup> *Id.*

## ANALYSIS

### PROCEDURAL BAR

The first question before us is whether this postconviction proceeding is procedurally barred. In 2009, Phelps filed his first motion for postconviction relief. In 2010, the motion was denied without an evidentiary hearing. In 2011, Phelps filed a petition to vacate and set aside his sentence. The district court treated this petition as a second motion for postconviction relief and again denied relief without conducting an evidentiary hearing.

[4-6] Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief.<sup>6</sup> The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.<sup>7</sup> Thus, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.<sup>8</sup>

Phelps filed the postconviction motion at issue on August 9, 2012. In it, he alleged that he is entitled to relief based on a diary that was first given to authorities in March. Because Phelps' motion affirmatively shows on its face that the ground for relief could not have been asserted at the time of the prior postconviction proceedings, the current proceeding is not procedurally barred. The district court erred in finding it was.

### SUFFICIENCY OF ALLEGATIONS

[7,8] The next question is whether Phelps alleged sufficient facts to entitle him to an evidentiary hearing on his postconviction motion. The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), provides that postconviction relief is available to a prisoner

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<sup>6</sup> *Hall v. State*, 264 Neb. 151, 646 N.W.2d 572 (2002); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

<sup>7</sup> *State v. Watkins*, *supra* note 4; *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

<sup>8</sup> *State v. Watkins*, *supra* note 4.

in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable.<sup>9</sup> Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.<sup>10</sup>

[9,10] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.<sup>11</sup> If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.<sup>12</sup>

[11] Phelps alleged no factual basis on which a court could conclude that his judgment of conviction was void or voidable because of a violation of his constitutional rights at trial or in the prosecution of his case. His allegations focus solely upon the diary, which he characterizes as "newly discovered evidence." Phelps alleges that because the time period for filing a motion for new trial based on newly discovered evidence has elapsed, his only means of bringing the diary to the court's attention is through a motion for postconviction relief. He is only partially correct. It is true that under § 29-2103, a motion for new trial based upon newly discovered evidence in a criminal case cannot be filed more than 3 years after the date of the verdict. But we have held that a motion for postconviction relief cannot be used to obtain, outside of the 3-year time limitation under § 29-2103, what is essentially a new trial

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<sup>9</sup> *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010); *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

<sup>10</sup> *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

<sup>11</sup> *State v. Watkins*, *supra* note 4.

<sup>12</sup> *Id.*

based on newly discovered evidence.<sup>13</sup> Therefore, postconviction is not a viable remedy for Phelps' newly discovered evidence claim.

We have acknowledged the possibility that a postconviction motion asserting a persuasive claim of actual innocence might allege a constitutional violation, in that such a claim could arguably amount to a violation of a movant's procedural or substantive due process rights.<sup>14</sup> However, in order to even trigger a court's consideration of whether continued incarceration could give rise to a constitutional claim that can be raised in a postconviction motion, there must be "[a] strong demonstration of actual innocence" "because after a fair trial and conviction, a defendant's presumption of innocence disappears."<sup>15</sup> Indeed, the U.S. Supreme Court has held that the threshold is "extraordinarily high."<sup>16</sup>

In *Herrera v. Collins*,<sup>17</sup> the Court concluded that this threshold was not met by affidavits stating that another person had committed the crime. The affidavits, which were made years after the conviction, contained hearsay and inconsistencies. Considering the affidavits in light of the evidence of the defendant's guilt at trial, the Court concluded that "this showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, *arguendo*, to exist."<sup>18</sup>

We concluded that the threshold showing of actual innocence had not been met in *State v. Lotter*.<sup>19</sup> In that case, the defendant sought postconviction relief based upon an affidavit from a trial witness which was signed 14 years after the crime.

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<sup>13</sup> *State v. Lotter*, *supra* note 7. See, also, *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

<sup>14</sup> See, *State v. Edwards*, *supra* note 3. *State v. Lotter*, *supra* note 7. See, also, *State v. El-Tabech*, *supra* note 13 (Gerrard, J., concurring).

<sup>15</sup> *State v. Edwards*, *supra* note 3, 284 Neb. at 401, 821 N.W.2d at 698.

<sup>16</sup> *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, 506 U.S. at 418-19.

<sup>19</sup> *State v. Lotter*, *supra* note 7.

In the affidavit, the witness recanted his trial testimony and claimed that he, and not the defendant, had fired the fatal shots in three murders. The witness had also been convicted of the murders and was serving life sentences. We concluded that the alleged recantation, when viewed in the context of the evidence at trial, did not constitute a showing of actual innocence sufficient to warrant an evidentiary hearing.

We reach the same conclusion here. Like the defendants in *Herrera* and *Lotter*, Phelps does not come before the court in this postconviction case “as one who is ‘innocent,’ but, on the contrary, as one who has been convicted by due process of law.”<sup>20</sup> Phelps’ postconviction claim that he was “wrongfully convicted” is based entirely upon the unsworn diary, which he alleges “will result in [his] exoneration.” Like the affidavits in *Herrera* and *Lotter*, the diary surfaced many years after the crime and resulting conviction. Phelps has not alleged any personal knowledge of the actual content of the diary or explained in any detail how its contents would necessarily exonerate him of the crime. His allegations are speculative and conclusory. When viewed in light of the trial evidence, as summarized in our opinion on direct appeal, Phelps’ allegations fall far short of the “extraordinarily high” threshold showing of actual innocence which he would be required to make before a court could even consider whether his continued incarceration would give rise to a constitutional claim. The district court did not err in concluding that Phelps did not allege facts sufficient to necessitate an evidentiary hearing.

#### APPOINTMENT OF COUNSEL

[12,13] Phelps also claims that the district court abused its discretion in denying his request for the appointment of counsel. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether to appoint counsel to represent the defendant.<sup>21</sup> When the defendant’s petition presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the

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<sup>20</sup> *Herrera v. Collins*, *supra* note 16, 506 U.S. at 399-400.

<sup>21</sup> *State v. Yos-Chiguil*, *supra* note 4.

appointment of counsel.<sup>22</sup> Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.<sup>23</sup>

As we have noted, Phelps has not alleged facts sufficient to entitle him to an evidentiary hearing on his postconviction claim, and thus has raised no justiciable issue of law or fact. The district court did not abuse its discretion in declining to appoint counsel.

### CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

HEAVICAN, C.J., not participating.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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TIMOTHY E. FITZGERALD, APPELLEE AND CROSS-APPELLANT, V.

CAMILLE M. FITZGERALD, NOW KNOWN AS CAMILLE M.

FANGMEIER, APPELLANT AND CROSS-APPELLEE.

835 N.W.2d 44

Filed June 14, 2013. No. S-12-1049.

1. **Jurisdiction.** The question of jurisdiction is a question of law.
2. **Default Judgments: Motions to Vacate: Appeal and Error.** In reviewing a trial court's action in vacating or refusing to vacate a default judgment, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion.
3. **Modification of Decree: Child Custody: Final Orders: Appeal and Error.** Ordinarily, an order modifying a dissolution decree to grant a permanent change of child custody would be final and appealable as an order affecting a substantial right made during a special proceeding.

4. **Jurisdiction: Notice: Fees: Time: Appeal and Error.** An appellate court generally does not acquire jurisdiction of an appeal unless a notice of appeal is filed and the docket fee is paid within 30 days of the final order.
5. **Motions for New Trial: Time: Appeal and Error.** An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.
6. **Pleadings: Judgments: Time: Appeal and Error.** In cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion tolls the time for filing a notice of appeal.
7. **Appeal and Error.** The proper filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal.
8. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal need only be asserted in the appellee's brief as provided by Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2012).
9. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte.
10. **Legislature: Courts: Time: Appeal and Error.** When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
11. **Final Orders: Time: Appeal and Error.** Where the time for appeal from a final order has expired without any appeal having been taken and thereafter a timely appeal is taken from a second final order in the same proceeding, a party to the timely appeal cannot use a cross-appeal to seek review of the first order.
12. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.
13. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
14. **Divorce: Modification of Decree: Child Custody: Child Support.** Modification of child custody and support in a dissolution action is made pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012) and is therefore a special proceeding.

Appeal from the District Court for Thayer County: VICKY L. JOHNSON, Judge. Affirmed.

Nancy S. Johnson, of Conway, Pauley & Johnson, P.C., for appellant.

Scott D. Grafton, of Svehla, Thomas, Rauert & Grafton, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LEMAN, and CASSEL, JJ.

CASSEL, J.

### INTRODUCTION

After the parties' marriage had been dissolved, Camille M. Fitzgerald, now known as Camille M. Fangmeier (Fangmeier), sought a modification of child custody and related matters. Timothy E. Fitzgerald was personally served, but he defaulted. The district court first entered a default modification order. On Fitzgerald's motion, the court entered a second order that vacated the first order. In this appeal, Fangmeier challenges the second order as an abuse of discretion. Fitzgerald cross-appeals but addresses only the first order. We initially decide that because the first order was a final order from which no appeal was timely perfected, Fitzgerald cannot use his cross-appeal to attack it. Next, we reject the argument that precedent forbids a court from promptly vacating a default modification order for failure to comply with an approved local district court rule requiring notice of the motion for default. Thus, we dismiss Fitzgerald's cross-appeal and affirm the district court's order vacating the first order.

### BACKGROUND

Fitzgerald and Fangmeier were divorced in 2007. The divorce decree awarded joint legal custody of the parties' minor child but ordered that Fangmeier would have primary physical custody. Fitzgerald was ordered to pay child support.

In December 2011, Fangmeier filed a complaint for modification of the divorce decree, seeking sole physical and legal custody of the child, unspecified changes in child support and visitation, and attorney fees and general equitable relief. Fitzgerald was personally served with a summons and a copy of the complaint.

After Fitzgerald failed to file an answer, Fangmeier moved for default judgment. She did not mail a copy of the motion or the related notice of the hearing to Fitzgerald or otherwise provide him with any notice of the hearing. He did not appear at the default judgment hearing, which was held on June 29, 2012.

On the day of the default hearing, the district court entered the first order. It modified the divorce decree as Fangmeier had

requested at the hearing. The first order gave Fangmeier sole physical and legal custody of the child; altered Fitzgerald's support obligation; adopted Fangmeier's proposed parenting plan; allocated expenses of daycare, extracurricular activities, and unreimbursed health care; assigned the child's income tax exemption to Fangmeier; and ordered Fitzgerald to pay Fangmeier's attorney fees.

Thirteen days after entry of the first order, Fitzgerald filed a motion for new trial, to alter or amend the first order, or to vacate it based on the absence of any notice of the default hearing. The district court conducted a hearing on Fitzgerald's motion and took the matter under advisement.

The district court's second order was entered on October 19, 2012. The second order overruled Fitzgerald's motions for new trial and to alter or amend as untimely but granted Fitzgerald's motion to vacate the first order. The court agreed with Fitzgerald that the first order should be vacated because Fangmeier failed to provide notice as required by the rules of the district court for the First Judicial District. The court relied upon the reasoning of *Cruz-Morales v. Swift Beef Co.*,<sup>1</sup> our decision in a workers' compensation appeal that upheld a Workers' Compensation Court rule requiring notice of a default hearing.

Fangmeier timely appealed from the second order. Fitzgerald filed a cross-appeal, but in it, he addressed only the first order. Pursuant to statutory authority, we moved the case to our docket.<sup>2</sup> Fangmeier moved to dismiss Fitzgerald's cross-appeal as untimely. We reserved ruling on Fangmeier's motion until plenary submission of the appeal. Upon completion of oral argument, the appeal was submitted.<sup>3</sup>

### ASSIGNMENTS OF ERROR

Fangmeier's appeal assigns, restated, that the district court's second order—granting Fitzgerald's motion to vacate the first order—was an abuse of the court's discretion. Fitzgerald's

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<sup>1</sup> *Cruz-Morales v. Swift Beef Co.*, 275 Neb. 407, 746 N.W.2d 698 (2008).

<sup>2</sup> Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

<sup>3</sup> See Neb. Ct. R. App. P. § 2-111 (rev. 2008).

cross-appeal assigns, restated, that the court abused its discretion in the first order, which found a material change of circumstances warranting modification of the decree as to child custody, visitation, and support, and allocation of the child's income tax exemption.

### STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law.<sup>4</sup>

[2] In reviewing a trial court's action in vacating or refusing to vacate a default judgment, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion.<sup>5</sup>

### ANALYSIS

#### JURISDICTION OF CROSS-APPEAL

We first address Fangmeier's motion to dismiss Fitzgerald's cross-appeal for lack of jurisdiction. She argues that no appeal was filed within 30 days after the first order and that Fitzgerald's cross-appeal in the instant appeal cannot be used for the purpose of attacking the first order. We agree.

[3,4] The first order was final and appealable, but no appeal was timely perfected. Ordinarily, an order modifying a dissolution decree to grant a permanent change of child custody would be final and appealable as an order affecting a substantial right made during a special proceeding.<sup>6</sup> The first order changed the child's custody, and thus, the first order was clearly a final, appealable order. But no appeal was filed by either party within 30 days after the entry of the first order. This court generally does not acquire jurisdiction of an appeal unless a notice of appeal is filed and the docket fee is paid within 30 days of the final order.<sup>7</sup> As to the first order, neither party filed a notice of appeal or deposited a docket fee. Once the time for appeal expired without any appeal having been perfected, the

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<sup>4</sup> *Butler County Dairy v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013).

<sup>5</sup> *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996).

<sup>6</sup> *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009).

<sup>7</sup> *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

first order ceased to be subject to appeal. Of course, it was still subject to the district court's jurisdiction to vacate or modify its own orders.<sup>8</sup>

[5,6] Fitzgerald's motions for new trial and to alter or amend the judgment were untimely and, thus, failed to terminate the running of the time for appeal from the first order. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.<sup>9</sup> Similarly, in cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion tolls the time for filing a notice of appeal.<sup>10</sup> Because Fitzgerald's motions for new trial and to alter or amend the judgment were filed outside of the 10-day time limit, neither motion affected the running of the appeal time on the first order. The appeal time expired before any appeal was taken.

[7,8] Fangmeier's timely appeal from the second order vested Fitzgerald with the right to cross-appeal. The proper filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal.<sup>11</sup> Thus, Fangmeier's appeal from the second order vested in Fitzgerald the right of cross-appeal from that order. The cross-appeal need only be asserted in the appellee's brief as provided by Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2012).<sup>12</sup> He purported to exercise this right.

[9-11] But Fitzgerald's cross-appeal assigned no error regarding the second order; instead, he attempted to attack the first order. Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte.<sup>13</sup> Once

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<sup>8</sup> See *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

<sup>9</sup> *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994).

<sup>10</sup> See *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

<sup>11</sup> Neb. Ct. R. App. P. § 2-101(E) (rev. 2010).

<sup>12</sup> *Id.*

<sup>13</sup> *Manske v. Manske*, *supra* note 9.

the 30-day period ran and neither party filed a timely appeal from the first order, it was no longer possible to invoke this court's jurisdiction of an appeal regarding that order. When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.<sup>14</sup> Although we can find no instance where a party has attempted to use a cross-appeal in this manner, our jurisprudence clearly dictates that Fitzgerald cannot do so. Thus, we hold that where the time for appeal from a final order has expired without any appeal having been taken and thereafter a timely appeal is taken from a second final order in the same proceeding, a party to the timely appeal cannot use a cross-appeal to seek review of the first order.

Because there are no issues raised in Fitzgerald's cross-appeal over which we have jurisdiction, we must dismiss his cross-appeal. We therefore sustain Fangmeier's motion.

#### MOTION TO VACATE DEFAULT MODIFICATION ORDER

[12,13] In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.<sup>15</sup> Fangmeier does not contest the district court's power to vacate the first order, but, rather, argues that the court abused its discretion in doing so. Clearly, the district court had the power to vacate the first order, and as we have already recited, we review the court's order doing so for an abuse of discretion. A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.<sup>16</sup>

The district court based its decision to vacate the first order upon the local rules of the district court for the First Judicial District. Rule 1-9 defines a "motion" as including

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<sup>14</sup> *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998).

<sup>15</sup> *Molczyk v. Molczyk*, *supra* note 8.

<sup>16</sup> *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129, 825 N.W.2d 767 (2013).

“applications, special appearances, and all requests for an order from the Court.”<sup>17</sup> The rule then requires that all motions be filed “not less than ten (10) working days prior to the hearing” and that at the time of filing of the motion, “the moving party shall obtain a date for hearing . . . and *provide notice to the opposing party*.”<sup>18</sup> The court reasoned that motions for default were not excepted from the definition of “motion” and that thus, the rule required that Fangmeier give notice of the hearing to Fitzgerald.

Fangmeier concedes that she failed to comply with the notice requirement of rule 1-9, but advances two broad arguments. First, she argues that the rule is contrary to Nebraska common law. Second, she argues that rule 1-9 is inconsistent with certain statutes and court rules. We now turn to the precedent she cites in support of her first argument.

Fangmeier cites an 1894 decision of this court, which states that there is “no statutory provision requiring a plaintiff to give notice of an application for a default and judgment.”<sup>19</sup> But that case involved only a monetary judgment and was premised upon the absence of any statute requiring notice of an appeal from a judgment of a justice of the peace—a type of court long abolished in Nebraska government.<sup>20</sup> In the case before us, the interests of a minor child are at stake. The district court was empowered to protect the interests of the minor child in this dissolution proceeding.<sup>21</sup>

Fangmeier relies heavily on this court’s decision in *Tejral v. Tejral*,<sup>22</sup> in which this court reversed an order vacating a default decree of dissolution involving child custody. But this court specifically noted in *Tejral* that “[n]either those statutes nor the applicable court rules of the Eleventh Judicial District of Nebraska required notice of the final hearing to be given”

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<sup>17</sup> Rules of Dist. Ct. of First Jud. Dist. 1-9 (rev. 2005).

<sup>18</sup> *Id.* (emphasis supplied).

<sup>19</sup> *McBrien v. Riley*, 38 Neb. 561, 564, 57 N.W. 385, 386 (1894).

<sup>20</sup> See 1969 Neb. Laws, ch. 419, § 1, p. 1434.

<sup>21</sup> See *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987).

<sup>22</sup> *Tejral v. Tejral*, 220 Neb. 264, 369 N.W.2d 359 (1985).

where the respondent was in default.<sup>23</sup> In the case before us, a rule of the district court for the First Judicial District of Nebraska does require such notice. Thus, the *Tejral* holding applies only where there is no local court rule requiring notice to be given.

Fangmeier also relies on other cases which directly or indirectly follow *Tejral*. *Joyce v. Joyce*<sup>24</sup> directly cited *Tejral* and addressed only an argument that due process was violated, making no reference to any local court rule. Similarly, *Starr v. King*<sup>25</sup> quoted that portion of the *Joyce* decision expressly relying on *Tejral*. Fangmeier also relies on our more recent decision in *State on behalf of A.E. v. Buckhalter*,<sup>26</sup> which cited the *Tejral* holding. But in *Buckhalter*, actual notice of the default hearing was given 11 days prior to the hearing by regular U.S. mail to the defendant's Mississippi, Pennsylvania, and New Jersey addresses. The district court refused to vacate the default judgment, and this court upheld that decision. Indeed, in *Buckhalter*, this court had little difficulty in rejecting the defendant's argument in light of the notice that was given.

Fangmeier also relies on this court's observation in *Starr*<sup>27</sup> that local court rules do not supersede the common law of this state. However, in *Starr*, this court made the observation at a time when local court rules were not approved and published by the Nebraska Supreme Court. That situation has changed. Since September 1, 1995, this court's rules have permitted district courts to propose local rules which become effective on approval by this court and publication in the Nebraska Advance Sheets.<sup>28</sup> Thus, local court rules have a different status than they did at the time of the *Starr* decision.

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<sup>23</sup> *Id.* at 267, 369 N.W.2d at 361 (emphasis supplied).

<sup>24</sup> *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988).

<sup>25</sup> *Starr v. King*, 234 Neb. 339, 451 N.W.2d 82 (1990).

<sup>26</sup> *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007).

<sup>27</sup> *Starr v. King*, *supra* note 25.

<sup>28</sup> See Neb. Ct. R. § 6-1501.

We turn to Fangmeier's second broad argument—that rule 1-9 is inconsistent with certain statutes and court rules. We are not persuaded that any conflict exists.

[14] First, Fangmeier cites Neb. Rev. Stat. § 25-1308 (Reissue 2008), which governs the procedure for a default judgment in a civil action.<sup>29</sup> But modification of child custody and support in a dissolution action is made pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012) and is therefore a special proceeding.<sup>30</sup> Indeed, in *Tejral*,<sup>31</sup> upon which Fangmeier relies, this court focused upon Neb. Rev. Stat. § 42-355 (Reissue 1984) and not upon § 25-1308. Thus, Fangmeier's reliance on § 25-1308 is misplaced.

Second, Fangmeier argues that rule 1-9 is inconsistent with Neb. Ct. R. Pldg. § 6-1105(a) (rev. 2011), which states, in pertinent part: “No *service* need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of a summons.” (Emphasis supplied.) We reject this argument for three reasons. First, we note that rule 1-9 merely requires “notice,” which can be satisfied with something less than “service.” For example, a telephone call to Fitzgerald or his counsel would have complied with the literal requirement of rule 1-9. Second, as we have already explained, local district court rules are now approved and published by this court and, thus, have a different status than at the time of our earlier decisions. Third, a notice requirement can easily be satisfied in a modification proceeding by a simple mailing of notice to the address that a parent is required to maintain on file with the clerk of the district court.<sup>32</sup> Thus, in a modification proceeding, the local rule's notice requirement would not “paralyze

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<sup>29</sup> See Neb. Rev. Stat. § 25-101 (Reissue 2008).

<sup>30</sup> See, *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled on other grounds*, *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

<sup>31</sup> *Tejral v. Tejral*, *supra* note 22.

<sup>32</sup> See Neb. Rev. Stat. § 42-364.13(1) (Reissue 2008).

the ordinary and orderly functioning of the legal process.”<sup>33</sup> Indeed, our decision in *Buckhalter*,<sup>34</sup> where such notice was given, illustrates that no delay or difficulty results from this simple procedure.

Our decision upholding the district court’s second order should not be read as mandating that a court must vacate a default judgment in a modification proceeding simply because notice of the hearing was not given. The circumstances may vary considerably from case to case. Our decision stands only for the proposition that under the circumstances in the present case, the district court did not abuse its discretion in granting the motion.

### CONCLUSION

Because Fitzgerald cannot use a cross-appeal from the second order to attack the first order, which was final and appealable and from which no appeal was timely taken, we dismiss his cross-appeal. We conclude that the district court did not abuse its discretion in granting Fitzgerald’s motion to vacate the first order. Thus, we affirm the district court’s second order, i.e., its order of October 19, 2012.

AFFIRMED.

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<sup>33</sup> See *Tejral v. Tejral*, *supra* note 22, 220 Neb. at 267, 369 N.W.2d at 361.

<sup>34</sup> *State on behalf of A.E. v. Buckhalter*, *supra* note 26.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE  
OF THE NEBRASKA SUPREME COURT, RELATOR,  
v. JOHN C. NIMMER, RESPONDENT.  
834 N.W.2d 776

Filed June 14, 2013. No. S-13-076.

Original action. Judgment of public reprimand.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK,  
MILLER-LEMAN, and CASSEL, JJ.

PER CURIAM.

### INTRODUCTION

Respondent, John C. Nimmer, was admitted to the practice of law in the State of Nebraska on September 17, 1993. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska. On January 31, 2013, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges consisting of one count against respondent. In the one count, it was alleged that by his conduct, respondent had violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-507.1 (communications concerning lawyer's services) and 3-508.4(a) (misconduct), along with other rules.

On April 30, 2013, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he had violated his oath of office as an attorney and §§ 3-507.1 and 3-508.4(a) and knowingly chose not to challenge or contest the truth of the matters conditionally admitted and waived all proceedings against him in connection therewith in exchange for a public reprimand.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's request for public reprimand is appropriate.

Upon due consideration, we approve the conditional admission and order that respondent be publicly reprimanded.

### FACTS

The formal charges state that in April 2011 and thereafter, respondent maintained a Web site identified as “www.nimmerlawoffice.com.” The purpose of the Web site was to advertise the legal services of respondent to individuals and businesses seeking to raise capital through individual investors to be located and provided by respondent and his law firm.

Respondent also marketed his services to individuals and businesses through a Web site identified as “www.nimmerlawscreening.com.” On this Web site, respondent made the following statements which, according to the formal charges, contain false and misleading information:

“‘Properly Qualified Angel Investor — Fast’ With 18 years of success we are the resource to get you the right angel investor — right now. Further, we make sure you are legally compliant. The angel investors we provide meet the required substantive-pre-existing relationship requirements of the Securities and Exchange Commission (SEC). To learn more and to see if you qualify call a representative or fill out the form below. We’ll provide a consultation to determine if you are approved. If you qualify you’ll be speaking to interested angel investors very soon. Our abilities and competence in assisting clients [to] get angel investors is impressive. We believe, you will be like so many others — quite pleased with our practical approach in getting you in touch with pre-qualified investors. This private method of financing is often much more effective and, faster than other methods of financing. This is an Advertisement For a Law Firm Specializing in Private Funding for Angel Investors.

“That being said, we have an unlimited number of wealthy investors plus new investors joining daily.

“But, The Nimmer Law Office has the solution to that dilemma — our third party pre-screened investors! These investors are screened to meet the rigid requirements of the pre-existing relationship. You can now confidently get

all the investors you want because we have what is called the three point test . . . investors. . . .

“Nimmer Law Office has all the requirements covered from initial legal structure to ongoing compliance/filing and the all important accredited investors with substantive, pre-existing relationships. In the final analysis, it is difficult to find better tools and investors than the Nimmer Law Office offers.

“Q: What kind of results will I get?

“A: All one can ethically do is look at the worst case scenario — And, it is probably not fair to either you or I to say you’ll be the worst ever. However, we have thousands of investors liquid at any given time in virtually all industries, therefore the worst case scenario is we will provide you with at least one qualified investor per business day for the duration of [your] contract. Each will be interested in speaking with you about your investment offer and will have the money on hand to invest with you.

“Q: How much capital have you raised in the past?

“A: We as a law firm never raise money! We make sure our clients are scheduled and on the phone with investors that are interested in their type of transaction and have the money to invest . . . .

“Q: How long have you been operating?

“A: 18 years[.]

“Q: How many deals has Nimmer closed?

“A: Many but we explicitly ask that the only thing you make your decision on are things that are actually tangible and deliverable, not hopes, guess work, past successes or predictions. Therefore, below is the actual product you will be purchasing[:]

- 1) A highly competent attorney
- 2) Compliance with all regulatory bodies
- 3) Qualified Investors
- 4) A call center to screen and schedule appointments for your company
- 5) Legal trust account and clearing service[.]”

In April 2011, a client and his business entity contacted respondent based upon the Internet advertising set forth above. On September 22, in reliance upon the advertising and the promises made therein, the client entered into a letter of engagement with respondent stating that respondent was to provide legal services regarding the promotion of the client's business and to locate qualified investors. The client paid respondent \$12,500 at the time he entered into the employment agreement with respondent.

According to the formal charges, after entering into the representation of the client and his business entity, and after receiving the \$12,500, respondent failed to provide the services advertised on his Web site. In particular, respondent failed to provide the qualified investors for which he was hired by the client.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules, including §§ 3-507.1 and 3-508.4(a).

### ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

(B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional

admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-507.1 and 3-508.4(a), as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

### CONCLUSION

Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

### JUDGMENT OF PUBLIC REPRIMAND.

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STATE OF NEBRASKA, APPELLEE, v.  
PATRICK W. VANDERPOOL, APPELLANT.  
835 N.W.2d 52

Filed June 21, 2013. No. S-12-755.

1. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision. The court reviews factual findings for clear error.
2. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
3. \_\_\_\_: \_\_\_\_\_. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.

4. \_\_\_\_: \_\_\_\_\_. To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
5. **Postconviction: Effectiveness of Counsel: Proof.** The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.
6. **Postconviction: Appeal and Error.** In a postconviction motion, an appellate court will not consider as an assignment of error a claim that was not presented to the district court.
7. **Postconviction: Evidence.** Issues of credibility are for the postconviction court.
8. **Postconviction: Effectiveness of Counsel: Sentences.** Allegations of ineffective assistance which are affirmatively refuted by a defendant's assurances to the sentencing court do not constitute a basis for postconviction relief.
9. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is the result of a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the convicted defendant can show a reasonable probability that, but for the errors of counsel, he or she would have insisted on going to trial rather than pleading.
10. **Postconviction: Effectiveness of Counsel: Proof.** In the context of a claim of ineffectiveness of counsel for failure to investigate, allegations are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.
11. **Licenses and Permits: Attorneys at Law: Effectiveness of Counsel.** The failure to meet technical licensing requirements does not render an attorney per se ineffective.
12. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Suspension for nonpayment of dues does not render an attorney's representation per se ineffective.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

## I. INTRODUCTION

A Nebraska attorney was suspended and later disbarred for nonpayment of dues. While suspended, the attorney represented

Patrick W. Vanderpool in a criminal case. When Vanderpool became aware of the suspension, he sought postconviction relief based upon alleged ineffective assistance of counsel. After an evidentiary hearing, the district court denied relief. The court first declined to apply a *per se* rule—reasoning that the attorney was qualified when admitted and was suspended solely for nonpayment of dues. After considering Vanderpool’s specific claims regarding his attorney’s performance, the court found that they either were affirmatively disproved by the record or constituted mere conclusions. We adhere to our previous rejection of a *per se* rule, and we find no error in the court’s specific findings. Thus, we affirm.

## II. BACKGROUND

In 2010, Vanderpool pled guilty to and was convicted of attempted first degree sexual assault, for which he was sentenced to 10 to 15 years’ imprisonment. There was no direct appeal.

Throughout the criminal proceedings, Vanderpool was represented by David M. Walocha and believed that Walocha was licensed to practice law in Nebraska. In actuality, Walocha’s license to practice law in Nebraska had been suspended since 1996 for nonpayment of dues. Vanderpool did not learn of this fact until after his sentencing. A few months later, in 2011, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Walocha for practicing law on a suspended license.<sup>1</sup> In 2012, Walocha was disbarred.<sup>2</sup>

After learning that Walocha’s license was suspended but before Walocha was disbarred, Vanderpool filed a motion for postconviction relief, alleging ineffective assistance of counsel. He argued that Walocha was ineffective because he (1) led Vanderpool to believe that Vanderpool would receive only probation and not incarceration if Vanderpool pled guilty as part of a plea agreement, (2) failed to interview witnesses or

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<sup>1</sup> See *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012).

<sup>2</sup> See *id.*

independently investigate the crime of which Vanderpool was convicted, and (3) represented himself as licensed to practice law in Nebraska when his license was in fact suspended.

After an evidentiary hearing, the district court denied Vanderpool's motion for postconviction relief. In its order, the court analyzed the motion under both a per se theory of ineffectiveness and under the standard two-part test of *Strickland v. Washington*.<sup>3</sup> The court found that Vanderpool was not entitled to relief for ineffective assistance of counsel under either approach.

Taking up the issue of Walocha's suspension first, the district court held that it was bound by *State v. McCroy*<sup>4</sup> to reject a per se determination of ineffectiveness. In *McCroy*, we declined to adopt a per se determination of ineffectiveness in the case of disbarment subsequent to representation—a factual situation the court viewed as similar to Vanderpool's representation by Walocha. The court also cited numerous cases from other jurisdictions, noting that “in varying sets of circumstances [c]ourts of other [s]tates have determined, almost unanimously, that an attorney whose license has been suspended for failure to pay dues may still be ‘counsel’ for Sixth Amendment purposes.”

After rejecting a per se determination of ineffectiveness, the district court then found that Vanderpool's specific allegations of ineffective assistance of counsel lacked merit under the criteria of *Strickland*. Addressing Vanderpool's argument that Walocha promised a sentence of probation if Vanderpool pled guilty, the court found that this allegation was affirmatively refuted by the record. The court explained as follows:

In this case, [Vanderpool] unequivocally represented to the [c]ourt, on the record, that no promises were made by anyone regarding his sentence[.] [H]aving clearly, intelligently and forthrightly set forth that he had not been

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<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>4</sup> *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000).

promised any particular sentence in return for his entry of a guilty plea to the amended charge[,] to now determine that his plea was not voluntarily entered based on promises made would be to make a mockery out of the arraignment [process].

As for Vanderpool's claim that Walocha failed to conduct an independent investigation, the court held that the allegations were "conclus[o]ry" in that Vanderpool "fail[ed] to allege with any specificity what exculpatory facts would have been discovered or how such discovery would have led to him not entering a plea of guilty to the significantly reduced charge."

Vanderpool timely appeals. Pursuant to statutory authority, we moved the case to our docket.<sup>5</sup>

### III. ASSIGNMENT OF ERROR

Vanderpool alleges that the district court erred in denying his motion for postconviction relief.

### IV. STANDARD OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.<sup>6</sup> Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.<sup>7</sup> The court reviews factual findings for clear error.<sup>8</sup>

### V. ANALYSIS

#### 1. INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*

[2-5] As in any other ineffective assistance of counsel case, we begin by reviewing Vanderpool's allegations under the two-part framework of *Strickland*. To prevail on a claim of

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<sup>5</sup> See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

<sup>6</sup> *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

ineffective assistance of counsel under *Strickland*, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.<sup>9</sup> To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.<sup>10</sup> To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.<sup>11</sup> The defendant has the burden in postconviction proceedings of demonstrating ineffectiveness of counsel, and the record must affirmatively support that claim.<sup>12</sup>

With these broad principles in mind, we turn to the specific errors that Vanderpool alleges Walocha committed. Liberally construed, Vanderpool's appellate brief argues that Walocha committed three specific errors: (1) He failed to file a direct appeal, (2) he led Vanderpool to believe that Vanderpool would receive only probation and not incarceration as part of a plea agreement, and (3) he failed to interview witnesses or independently investigate the crime of which Vanderpool was convicted. We find that Vanderpool is not entitled to relief based on any of these alleged errors in Walocha's actual performance.

#### (a) Failure to Appeal

[6] Vanderpool alleges that Walocha was ineffective for failing to file a direct appeal after Vanderpool specifically requested that he do so. But Vanderpool did not raise this issue in his motion for postconviction relief. Neither did the district court rule on whether Walocha was ineffective for failing to file a direct appeal. In a postconviction motion, an appellate court will not consider as an assignment of

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<sup>9</sup> *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

error a claim that was not presented to the district court.<sup>13</sup> To the extent Vanderpool argues that Walocha was ineffective for failing to file a direct appeal, we decline to consider this allegation.

(b) Advice Regarding Guilty Plea

Vanderpool also argues that Walocha was ineffective for misrepresenting the terms of the plea agreement and thus leading Vanderpool to enter a guilty plea. At the evidentiary hearing before the district court, Vanderpool testified that Walocha told him that Walocha had reached an agreement with the prosecutor that would guarantee probation if Vanderpool pled guilty. According to Vanderpool, he pled guilty based solely on this promise of probation.

In evaluating this allegation, the district court highlighted that Vanderpool's responses to the sentencing court's questions on the record refuted the facts upon which he based this allegation of ineffective assistance of counsel. Indeed, the transcript from Vanderpool's sentencing hearing indicates that the plea agreement involved "the State not making any sentencing recommendation at the time of sentencing." When asked whether this was an accurate description of the plea agreement, Vanderpool responded, "Yes." Later, after Vanderpool entered a plea of guilty, the sentencing court asked, "[A]part from the State agreeing to withhold a sentencing recommendation, has anyone promised you anything or threatened you to get you to do this?" Vanderpool replied, "No, sir." The sentencing court asked whether Vanderpool was "doing this of [his] own free will." Vanderpool answered that he was entering a guilty plea of his own free will. Based on Vanderpool's answers on the record to these questions, we agree that the record affirmatively refutes his allegation that his counsel misrepresented the plea agreement.

During the evidentiary hearing, Vanderpool attempted to reconcile the contradiction between his answers during sentencing and his allegations of ineffective assistance of counsel

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<sup>13</sup> *State v. Yos-Chiguil*, *supra* note 6.

by claiming that he lied to the sentencing judge. According to Vanderpool, Walocha specifically advised him to deny that “there was a reason why [he] was pleading guilty” and to “say no” if asked whether anyone promised him a specific sentence in return for pleading guilty. Vanderpool stated that he did as Walocha told him because he thought Walocha was “leading [him] in the right direction” and “doing his job” as an attorney.

[7] Given this evidence, the district court was faced with the option of relying upon the official transcript of Vanderpool’s sentencing hearing, which disproved that he had been promised probation in exchange for entering a guilty plea, or rejecting this portion of the record based on Vanderpool’s testimony that he lied to the sentencing court upon the advice of Walocha. Issues of credibility are for the postconviction court.<sup>14</sup> The court chose to accept the record over Vanderpool’s testimony, noting that to accept his after-the-fact explanation for entering a guilty plea “would be to make a mockery out of the arraignment [process].” We find no clear error in the court’s assessment of Vanderpool’s credibility.

[8] This court has previously held that allegations of ineffective assistance which are affirmatively refuted by a defendant’s assurances to the sentencing court do not constitute a basis for postconviction relief.<sup>15</sup> As we have noted:

If the dialogue which is required between the court and the defendant whereat, as here, the court receives an affirmative answer as to whether the defendant understands the specified and full panoply of constitutional rights . . . and whether it is true that defendant was not improperly influenced by threats or promises . . . all done during the sanctity of a full and formal court proceeding, is to be impugned by a mere recantation made after the doors of the prison clang shut, we are wasting our time

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<sup>14</sup> *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

<sup>15</sup> See, e.g., *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

and that of the trial judges, making a mockery out of the arraignment process.<sup>16</sup>

Because the record refutes Vanderpool's allegation that Walocha allegedly misrepresented the plea agreement, the district court did not err in finding that Vanderpool was not entitled to relief on that ground.

### (c) Failure to Investigate

Finally, Vanderpool argues that Walocha was ineffective because he failed to "conduct an independent investigation of the facts."<sup>17</sup> In his motion for postconviction relief, Vanderpool further alleged that Walocha "never interviewed any of the witnesses against [him]." The district court dismissed this allegation because it failed to "allege with any specificity what exculpatory facts would have been discovered or how such discovery would have led to [Vanderpool's] not entering a plea of guilty to the significantly reduced charge."

[9,10] In order to satisfy the prejudice prong of *Strickland*, a defendant must "show a reasonable probability that but for counsel's deficient performance, the result of the proceeding in question would have been different."<sup>18</sup> When a conviction is the result of a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the convicted defendant can show a reasonable probability that, but for the errors of counsel, he or she would have insisted on going to trial rather than pleading.<sup>19</sup> Specifically, in the context of a claim of ineffectiveness of counsel for failure to investigate, allegations are "too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case."<sup>20</sup>

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<sup>16</sup> *State v. Scholl*, 227 Neb. 572, 580, 419 N.W.2d 137, 142 (1988).

<sup>17</sup> Brief for appellant at 6.

<sup>18</sup> *State v. Jackson*, 275 Neb. 434, 443, 747 N.W.2d 418, 430 (2008).

<sup>19</sup> *State v. Golka*, *supra* note 15.

<sup>20</sup> *State v. Edwards*, 284 Neb. 382, 412-13, 821 N.W.2d 680, 705 (2012).

Based on these standards, the district court did not err in denying Vanderpool relief for his counsel's alleged failure to investigate. Vanderpool did not identify what exculpatory evidence investigation would have uncovered, which witnesses Walocha should have interviewed, or what testimony those witnesses would have provided. And when asked during oral arguments how further investigation would have changed the outcome of the criminal proceedings, Vanderpool stated that he was not certain that the outcome would have been different. The district court's implicit finding—that Vanderpool would not have insisted on going to trial rather than pleading—was not clearly erroneous. Thus, Vanderpool failed to show how he was prejudiced by Walocha's alleged failure to investigate.

For all of these reasons, Vanderpool is not entitled to relief based on any of the alleged errors in Walocha's actual performance. The district court did not err in so concluding.

## 2. PER SE INEFFECTIVE ASSISTANCE OF COUNSEL

Because Vanderpool failed to show that he is entitled to relief under *Strickland*, his claim of ineffective assistance of counsel can succeed only if a per se rule applies. We now turn to that issue.

A per se determination of ineffective assistance of counsel is based on the proposition that when "surrounding circumstances justify a presumption of ineffectiveness" a court can find a claim of ineffective assistance of counsel to "be sufficient without inquiry into counsel's actual performance at trial."<sup>21</sup> When the right circumstances are present, prejudice is presumed.<sup>22</sup> A per se determination of ineffective assistance of counsel thus sits in stark contrast to a determination that counsel is ineffective under *Strickland*, because such a per se finding is not based on the particulars of counsel's representation.

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<sup>21</sup> *United States v. Cronin*, 466 U.S. 648, 662, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

<sup>22</sup> See *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

This court rejected a per se determination of ineffective assistance of counsel in *McCroy*.<sup>23</sup> In that case, Barry D. McCroy sought postconviction relief because his attorney was disbarred after representing McCroy for failing to disclose a disbarment in Colorado when applying for a license to practice law in Nebraska. On these facts, we declined to adopt a per se determination of ineffectiveness, but, rather, analyzed McCroy's postconviction motion "under the *Strickland* test based upon [his attorney's] actual performance in representing McCroy."<sup>24</sup>

Because the issue of per se ineffective assistance of counsel was one of first impression in *McCroy*, we engaged in a lengthy discussion of case law from other courts. In doing so, we noted that other courts adopted a per se determination of ineffectiveness in situations where an attorney (1) was "unsuccessful in passing the bar examination and thus was never admitted to practice as a lawyer,"<sup>25</sup> (2) was admitted to practice law "on the basis of false representations regarding his legal education,"<sup>26</sup> (3) was denied a license to practice law "due to lack of moral character,"<sup>27</sup> (4) had "submitted his resignation to the state bar with disciplinary proceedings pending,"<sup>28</sup> and (5) was deemed incompetent to represent clients.<sup>29</sup> In contrast, we cited to other courts that declined to adopt a per se rule of ineffectiveness in the case of attorney suspension;<sup>30</sup> disbarment of "an attorney previously qualified

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<sup>23</sup> See *State v. McCroy*, *supra* note 4.

<sup>24</sup> *Id.* at 717, 613 N.W.2d at 7.

<sup>25</sup> *Id.* at 713, 613 N.W.2d at 5 (discussing *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983)).

<sup>26</sup> *Id.* (discussing *U.S. v. Novak*, 903 F.2d 883 (2d Cir. 1990)).

<sup>27</sup> *Id.* (discussing *Huckelbury v. State*, 337 So. 2d 400 (Fla. App. 1976)).

<sup>28</sup> *Id.* at 714, 613 N.W.2d at 5 (discussing *In re Johnson*, 1 Cal. 4th 689, 822 P.2d 1317, 4 Cal. Rptr. 2d 170 (1992)).

<sup>29</sup> See *id.* (discussing *People v. Hinkley*, 193 Cal. App. 3d 383, 238 Cal. Rptr. 272 (1987), and *Ex parte Williams*, 870 S.W.2d 343 (Tex. App. 1994)).

<sup>30</sup> See *State v. McCroy*, *supra* note 4 (discussing *State v. Smith*, 476 N.W.2d 511 (Minn. 1991)).

and in good standing’”<sup>31</sup>; and license revocation due to an attorney’s false reporting on his application,<sup>32</sup> among others. In particular, we emphasized the finding of the Ninth Circuit that “‘the infliction of discipline upon an attorney previously qualified and in good standing will not and should not transform his services into ineffective assistance.’”<sup>33</sup>

Based on this survey of case law, we concluded that there is “a valid distinction between representation by one who has never been qualified to practice law and one who was properly admitted in the first instance but is subsequently suspended or disbarred.”<sup>34</sup> The facts showed that McCroy’s attorney graduated from an accredited law school, passed the bar examination, and was admitted to practice law in Nebraska prior to being disbarred. Because McCroy’s attorney “was properly admitted to practice law in this state in the first instance and was licensed to do so at the time of the challenged representation,” we declined to adopt a per se determination of ineffectiveness even though the attorney was subsequently disbarred.<sup>35</sup>

From *McCroy*, we conclude that the question whether an attorney has met the substantive requirements for a license to practice law at any time is at the heart of our consideration whether to apply a per se determination of ineffectiveness. This focus on the substantive requirements for a license is consistent with the decisions of other courts. In considering whether to adopt a per se rule, the Seventh Circuit has noted that “the constitutional focus is on whether the federal court is satisfied that the attorney is competent and has authorized him to practice law.”<sup>36</sup> Similarly, the Fifth Circuit has

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<sup>31</sup> *Id.* at 715, 613 N.W.2d at 6 (quoting *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986)).

<sup>32</sup> See *id.* (discussing *Vance v. Lehman*, 64 F.3d 119 (3d Cir. 1995)).

<sup>33</sup> *Id.* at 715, 613 N.W.2d at 6 (quoting *United States v. Mouzin*, *supra* note 31).

<sup>34</sup> *Id.* at 717, 613 N.W.2d at 7.

<sup>35</sup> *Id.* at 719, 613 N.W.2d at 8.

<sup>36</sup> *U.S. v. Williams*, 934 F.2d 847, 851 (7th Cir. 1991).

stated that “the key to adequate representation is not technical license to practice in the jurisdiction involved, but a credential from *some* forum demonstrating the specialized knowledge of a lawyer.”<sup>37</sup>

[11] The logical implication of placing such focus on substantive requirements when considering whether to apply a *per se* rule is that the failure to meet technical licensing requirements does not render an attorney *per se* ineffective. Courts have overwhelmingly declined to adopt a *per se* determination of ineffectiveness in the case of an attorney who has been suspended or otherwise disciplined for practicing law while technical defects exist in his or her license.<sup>38</sup> Even courts that have adopted a *per se* determination of ineffectiveness have limited their holdings by differentiating technical requirements of the licensing process from substantive ones.<sup>39</sup>

[12] Under this prevailing rule, suspension for nonpayment of dues does not render an attorney’s representation *per se* ineffective. The payment of dues is a technical requirement for a license to practice law and does not reflect on an attorney’s competence, ability, or legal skill. As the Kansas Supreme Court stated in *Johnson v. State*,<sup>40</sup> “Although the payment of the registration fee is a prerequisite to the ethical practice of law in this state, the payment itself has nothing to do with the legal ability of the attorney.” Because the payment of dues is merely a technical requirement for the maintenance of a license

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<sup>37</sup> *U.S. v. Maria-Martinez*, 143 F.3d 914, 917 (5th Cir. 1998) (emphasis in original).

<sup>38</sup> See, e.g., *U.S. v. Watson*, 479 F.3d 607 (8th Cir. 2007); *U.S. v. Ross*, 338 F.3d 1054 (9th Cir. 2003); *U.S. v. Mitchell*, 216 F.3d 1126 (D.C. Cir. 2000); *Vance v. Lehman*, *supra* note 32; *U.S. v. Rosnow*, 981 F.2d 970 (8th Cir. 1992); *U.S. v. Williams*, *supra* note 36; *United States v. Mouzin*, *supra* note 31; *United States v. Hoffman*, 733 F.2d 596 (9th Cir. 1984); *In re Johnson*, *supra* note 28; *People v. Pubrat*, 451 Mich. 589, 548 N.W.2d 595 (1996); *State v. Smith*, *supra* note 30; *Com. v. Allen*, 48 A.3d 1283 (Pa. Super. 2012); *Cantu v. State*, 930 S.W.2d 594 (Tex. Crim. App. 1996).

<sup>39</sup> See, e.g., *U.S. v. Novak*, *supra* note 26; *Solina v. United States*, *supra* note 25.

<sup>40</sup> *Johnson v. State*, 225 Kan. 458, 465, 590 P.2d 1082, 1087 (1979).

to practice law and Walocha's nonpayment of dues was the sole reason that he was suspended at the time he represented Vanderpool, we decline to adopt a per se determination of ineffectiveness. Numerous other courts have specifically addressed nonpayment of dues and have reached this same conclusion.<sup>41</sup> In the words of the Illinois Supreme Court, "To find a defendant's [S]ixth [A]mendment right to counsel to have been violated, there must be additional factors above and beyond a mere suspension for nonpayment of bar dues."<sup>42</sup>

Vanderpool attempts to distinguish his case from *McCroy*. He argues that unlike the attorney who represented McCroy, Walocha was "unlicensed in Nebraska at the time of his representation of [Vanderpool]."<sup>43</sup> We are not persuaded. *McCroy* focused on whether an attorney had met the substantive requirements to practice law, including completion of adequate legal education, possession of moral character at the time of admission, and passage of the bar examination. Because the attorney in *McCroy* had fulfilled all of these requirements, we held that he was not per se ineffective even though he was later disbarred. In the instant case, these same relevant facts are present—Walocha was admitted to practice law in Nebraska in 1994 after meeting all the substantive requirements. The *McCroy* holding dictates our resolution of Vanderpool's appeal. As explained above, under the distinction between substantive and technical licensing requirements

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<sup>41</sup> See, e.g., *Kieser v. People of State of New York*, 56 F.3d 16 (2d Cir. 1995); *Reese v. Peters*, 926 F.2d 668 (7th Cir. 1991); *Beto v. Barfield*, 391 F.2d 275 (5th Cir. 1968); *U.S. v. Dumas*, 796 F. Supp. 42 (D. Mass. 1992); *People v. Medler*, 177 Cal. App. 3d 927, 223 Cal. Rptr. 401 (1986); *Dolan v. State*, 469 So. 2d 142 (Fla. App. 1985); *Cornwell v. Dodd*, 270 Ga. 411, 509 S.E.2d 919 (1999); *People v. Brigham*, 151 Ill. 2d 58, 600 N.E.2d 1178, 175 Ill. Dec. 720 (1992); *Johnson v. State*, *supra* note 40; *Commonwealth v. Thomas*, 399 Mass. 165, 503 N.E.2d 456 (1987); *People v. Brewer*, 88 Mich. App. 756, 279 N.W.2d 307 (1979); *Jones v. State*, 747 S.W.2d 651 (Mo. App. 1988); *Com. v. Jones*, 829 A.2d 345 (Pa. Super. 2003); *Hill v. State*, 393 S.W.2d 901 (Tex. Crim. App. 1965).

<sup>42</sup> *People v. Brigham*, *supra* note 41, 151 Ill. 2d at 71, 600 N.E.2d at 1184-85, 175 Ill. Dec. at 726-27.

<sup>43</sup> Brief for appellant at 10.

established in *McCroy*, Walocha's suspension for nonpayment of dues did not render him per se ineffective.

## VI. CONCLUSION

Based on our previous holding in *McCroy*, we decline to adopt a per se determination of ineffectiveness based solely upon the fact that Vanderpool's attorney was suspended for nonpayment of dues at the time he represented Vanderpool in his criminal proceedings. We also find that Vanderpool failed to show that he was denied the effective assistance of counsel based on specific aspects of his attorney's actual performance. Accordingly, we affirm the judgment of the district court denying Vanderpool postconviction relief.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, v.  
DAVID SCHANAMAN, APPELLANT.  
835 N.W.2d 66

Filed June 21, 2013. No. S-12-808.

1. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute. And, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
2. **Pleas.** When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may grant the motion for any fair and just reason, if such withdrawal would not substantially prejudice the prosecution.
3. **Indictments and Informations: Courts.** Neb. Rev. Stat. § 29-1802 (Reissue 2008) does not apply to complaints in county court.
4. **Statutes: Judicial Construction: Legislature: Presumptions.** When the Nebraska Supreme Court has construed a statute in a certain manner and that construction has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's construction.

Appeal from the District Court for Kimball County, DEREK C. WEIMER, Judge, on appeal thereto from the County Court for Kimball County, RANDIN ROLAND, Judge. Judgment of District Court affirmed.

Todd Morten, of Island & Huff, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

HEAVICAN, C.J., WRIGHT, STEPHAN, MCCORMACK, and CASSEL, JJ.

PER CURIAM.

### NATURE OF THE CASE

The State filed a complaint against David Schanaman in county court, charging him with third degree domestic assault. That same day, the court arraigned Schanaman and accepted his no contest plea. Two weeks later, and before sentencing, Schanaman moved to withdraw his plea. He argued that he had not received the complaint 24 hours before being asked to plead, as required by Neb. Rev. Stat. § 29-1802 (Reissue 2008), which he contended applied to complaints in county court. The court denied his motion, and the district court affirmed. Because § 29-1802 applies to prosecutions by indictment or information and not complaints in county court, failure to comply with it was not a “fair and just reason” for Schanaman to withdraw his plea. As such, the county court did not abuse its discretion in denying his motion. We affirm.

### BACKGROUND

The parties do not dispute the facts. On December 27, 2011, the State filed a complaint against Schanaman charging him with third degree domestic assault. That same day, Schanaman appeared before the court without counsel. After the prosecutor read the charges, the court then explained to Schanaman the nature of the charges and the possible penalties involved, and then reviewed Schanaman’s rights. This review covered his rights to counsel, to speedy trial, to confront and cross-examine the State’s witnesses, to present evidence in his defense, to remain silent, to testify, and to appeal.

After Schanaman expressly waived his right to counsel, the court explained the different types of pleas. The court then told Schanaman that if he entered a not guilty plea, the court would schedule the case for further proceedings, including a trial. But if Schanaman entered a guilty or no contest plea, his plea

would waive the majority of his rights. The court then asked for his plea, and Schanaman pleaded no contest. The court questioned him about his plea, asking whether anyone had made any promises, threats, or inducements which prompted his plea, and whether his plea was voluntary. Schanaman answered that his plea was voluntary and not the result of anything improper; as reason for his plea, he explained that he “just want[ed] to make peace with this.” Based on his plea and the accompanying factual basis, the court accepted his plea and found Schanaman guilty.

On January 10, 2012, after obtaining an attorney, Schanaman moved to withdraw his plea. Schanaman argued that § 29-1802 required that he have a copy of the complaint 24 hours before being asked to plead, which did not happen. Schanaman then argued that he had two other matters pending in the county—another criminal matter and a divorce—and that the State would not be substantially prejudiced, if at all, by his withdrawing his plea. The State argued that § 29-1802 did not apply and that Schanaman had not shown a fair and just reason for withdrawing his plea. The court agreed with the State, emphasizing the colloquy outlined above, and denied Schanaman’s motion.

The district court affirmed. The court determined that § 29-1802 did not apply, from its plain language, to misdemeanors or county courts. The court determined that, from the record, Schanaman “entered his plea voluntarily, intelligently and not as a result of improper promises, threats or inducements.” The district court found no basis for withdrawing the plea, other than that Schanaman “apparently thought better of his plea after speaking with counsel.” That being insufficient, the court found no abuse of discretion and affirmed the county court’s order.

### ASSIGNMENTS OF ERROR

Schanaman assigns, restated, that the district court erred in concluding that (1) § 29-1802 did not apply to a misdemeanor complaint in county court and (2) the county court did not abuse its discretion in denying Schanaman’s motion to withdraw his plea.

### STANDARD OF REVIEW

[1] The right to withdraw a plea previously entered is not absolute. And, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.<sup>1</sup>

### ANALYSIS

[2] The county court refused to allow Schanaman to withdraw his plea. When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may grant the motion for any fair and just reason, if such withdrawal would not substantially prejudice the prosecution.<sup>2</sup> Schanaman argues that he gave a "fair and just reason" to withdraw his plea and that the county court abused its discretion in denying his motion.

Specifically, Schanaman argues that he was not served with the complaint 24 hours before being asked to plead. Section 29-1802 requires a defendant to be served with the indictment 24 hours before that defendant is asked to plead. Schanaman argues that this 24-hour requirement applies to complaints in county court. Schanaman also argues that he had other cases—another criminal matter and a divorce—pending in the same county and that the State would not be substantially prejudiced, if at all, by his withdrawing his plea. We note that the latter arguments relate to the substantial prejudice issue, which is separate from whether Schanaman presented a "fair and just reason" to withdraw his plea.<sup>3</sup> The sole basis for his motion to withdraw his plea is his interpretation of § 29-1802.

But if § 29-1802 does not apply to complaints in county court, then the failure to comply with it cannot be a fair and just reason for Schanaman to withdraw his plea. We set § 29-1802 out in full:

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<sup>1</sup> See, e.g., *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010); *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

<sup>2</sup> See, e.g., *Williams*, *supra* note 1.

<sup>3</sup> See *id.*

The clerk of the district court shall, upon the filing of any indictment with him, and after the person indicted is in custody or let to bail, cause the same to be entered of record on the journal of the court; and in case of the loss of the original, such record or a certified copy thereof shall be used in place thereof upon the trial of the cause. Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant. No one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid.

[3] We give statutory language its plain and ordinary meaning.<sup>4</sup> We agree with the district court that, from a plain reading of § 29-1802, it does not apply to complaints in county court. Section 29-1802 specifically references procedure in felony cases (which the county court cannot try<sup>5</sup>), and it speaks only of “indictments,” rather than “complaints.” And although Neb. Rev. Stat. § 29-1604 (Reissue 2008) specifically extends indictment procedure to informations, there is no such provision extending indictment procedure to complaints. We also note that Neb. Rev. Stat. § 29-404 (Cum. Supp. 2012), which deals with filing complaints in county court, does not impose any requirements similar to § 29-1802 or reference it in any way.

But Schanaman argues that § 29-1802 cannot be read in isolation. He argues that Neb. Rev. Stat. § 29-424 (Reissue 2008), which provides that a complaint must be filed in citation cases 24 hours before the defendant is set to appear in county court, supports extending the 24-hour requirement of § 29-1802 to complaints in county court. We find this unpersuasive. Section

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<sup>4</sup> See *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013).

<sup>5</sup> See Neb. Rev. Stat. § 24-517 (Cum. Supp. 2012).

29-424 shows that the Legislature understood how to create a 24-hour waiting period for situations other than citations, if it wished to do so. But it did not.

Schanaman also argues that Neb. Rev. Stat. § 25-2701 (Cum. Supp. 2012) extends § 29-1802 to complaints in county court. Section 25-2701 provides, in relevant part:

All provisions in the codes of criminal and civil procedure governing actions and proceedings in the district court not in conflict with statutes specifically governing procedure in county courts and related to matters for which no specific provisions have been made for county courts shall govern and apply to all actions and proceedings in the county court.

Schanaman argues that § 29-1802 governs an action or proceeding in district court, that it does not conflict with statutes specifically governing county court procedure, and that it is related to matters for which no specific provisions have been made for county courts. But while § 29-1802 in that sense “applies” to county courts, § 29-1802’s specific language does not apply to *complaints*. We will not rewrite the statute to make it do so.

It is correct that under § 25-2701, we have applied district court procedure to county court proceedings. For example, we have applied § 25-2701 to allow parties in county court to file motions for new trial<sup>6</sup> and motions for summary judgment,<sup>7</sup> and to allow county courts to assess attorney fees against the State under Neb. Rev. Stat. § 25-1803(1) (Reissue 2008).<sup>8</sup> But doing so did not require any substantive change to the statutory language; motions for new trial and summary judgment remained motions for new trial and summary judgment.<sup>9</sup>

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<sup>6</sup> See *132nd Street Ltd. v. Fellman*, 245 Neb. 59, 511 N.W.2d 88 (1994).

<sup>7</sup> See *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995).

<sup>8</sup> See *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996).

<sup>9</sup> See, *132nd Street Ltd.*, *supra* note 6; Neb. Rev. Stat. §§ 25-1144 (Cum. Supp. 2012) and 25-1144.01 (Reissue 2008); *Buckingham*, *supra* note 7; Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008).

Similarly, allowing the county court to assess attorney fees against the State under § 25-1803(1) did not require any substantive change to the statutory language.<sup>10</sup>

But to apply § 29-1802, as Schanaman urges, to complaints in county court would require substantively changing the text of § 29-1802. Unlike statutes related to motions for new trial, for example, we cannot apply the text of § 29-1802 to proceedings in county court. Most obviously, § 29-1802 refers only to indictments, and so we would be required to substitute “complaint” for “indictment” in the statute. It is true that § 29-1802 also does not refer to informations. But substituting “information” for “indictment” under § 29-1604 does not create any procedural difficulties. Substituting “complaint” for “indictment,” however, does create such difficulties.

The first sentence of § 29-1802 requires the clerk of the district court to make a record of the indictment, and if the original is lost, that copy may be used “upon the trial of the cause.” This sentence does not distinguish between felonies and misdemeanors, and the requirement to make a record applies to indictments and informations in district court—both may be used to prosecute felonies and misdemeanors.<sup>11</sup> But the same is not true of complaints in county court. As we have noted in the past, a felony charge generally originates by complaint in county court, but after a preliminary hearing and probable cause finding, the county court must bind the defendant over to the district court.<sup>12</sup> There, an information is filed, and the trial would proceed on that information.<sup>13</sup> So applying the first sentence of § 29-1802 to complaints in county court would make no sense when a felony is charged. Yes, the clerk of the county court could make a record of the filed complaint, but it (or a copy) could never be used “upon the trial of the cause” in a felony case.

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<sup>10</sup> See, *In re Interest of Krystal P. et al.*, *supra* note 8; § 25-1803(1).

<sup>11</sup> See, Neb. Rev. Stat. §§ 29-1407 and 29-1601 (Reissue 2008); *Nelson v. State*, 115 Neb. 26, 211 N.W. 175 (1926).

<sup>12</sup> See *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

<sup>13</sup> See *id.*

Moreover, applying the second sentence of § 29-1802 to complaints in county court would be impractical. That sentence, in short, requires service on the defendant of a copy of the indictment or information in all felony cases and in every other case on request. Applying § 29-1802 to complaints in county court would, in a felony case, require service of the complaint on the defendant. And once the defendant was bound over to district court, § 29-1802 would again require service of essentially the same document, in the form of an information, on the defendant. This redundancy would be unnecessary and a waste of judicial resources.

True enough, in *State v. Lebeau*,<sup>14</sup> we cited § 25-2701 as support for extending the statutory speedy trial right to complaints for city ordinance violations, in addition to statutory violations. And that was not simply a matter of applying the statutory language as written in the county court setting. We premised that reasoning, however, on our longstanding history of applying the statutory speedy trial right to complaints in county court (even though the speedy trial act expressly refers only to indictments and informations).<sup>15</sup> There is no such history here.

However, Schanaman emphasizes that both the statutory speedy trial act and § 29-1802 expressly refer only to indictments and informations. And yet he notes that, despite not referencing complaints, we have applied the statutory speedy trial right to complaints in county court. He argues that we must similarly extend § 29-1802 to complaints in county court. We disagree.

Schanaman is correct regarding the statutory speedy trial right. In *State v. Stevens*,<sup>16</sup> we held that “[a]lthough statutory requirements for a speedy trial expressly refer only to indictments and informations, the references may encompass complaints.” We reasoned that “[i]nclusion of complaints has been our practice over the years, and nothing in the new statute

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<sup>14</sup> See *State v. Lebeau*, 280 Neb. 238, 784 N.W.2d 921 (2010).

<sup>15</sup> See *id.*

<sup>16</sup> *State v. Stevens*, 189 Neb. 487, 488, 203 N.W.2d 499, 500 (1973).

suggests change.”<sup>17</sup> And we have applied the statutory speedy trial right to complaints in county court ever since.<sup>18</sup>

[4] But the *Stevens* court ignored the plain statutory language at issue, apparently because local practitioners had always applied the statutory speedy trial right to complaints in county court. Not only is this reasoning questionable (we cannot simply ignore statutory language), but it is inapplicable here. As Schanaman’s attorney noted at oral argument, it is routine for the defendant to receive a copy of the complaint and then soon after be asked to plead. However, putting aside the questionable reasoning in *Stevens*, we reaffirmed that result in subsequent case law, and the Legislature has not seen fit to change the law. When we have construed a statute in a certain manner and that construction has not evoked a legislative amendment, we presume that the Legislature has acquiesced in our construction.<sup>19</sup> But that does not require us to employ questionable reasoning again, in a different context, and we decline to do so here.

### CONCLUSION

We conclude that § 29-1802 has no application to a complaint in county court and that, therefore, failure to comply with § 29-1802 here could not be a fair and just reason to withdraw Schanaman’s plea. The county court did not abuse its discretion in denying Schanaman’s motion. We affirm.

AFFIRMED.

CONNOLLY and MILLER-LERMAN, JJ., participating on briefs.

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<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., *Lebeau*, *supra* note 14.

<sup>19</sup> See, e.g., *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

MARY FOX, APPELLEE, v. RAYMOND WHITBECK, APPELLEE,  
AND SHERRY L. McEWIN, FORMERLY KNOWN AS SHERRY  
L. WHITBECK, INTERVENOR-APPELLEE, AND JOHN  
McWILLIAMS, INTERVENOR-APPELLANT.  
835 N.W.2d 638

Filed June 21, 2013. No. S-12-821.

1. **Judicial Sales: Appeal and Error.** An appellate court reviews a court's order confirming an execution sale or a judicial sale for abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Judgments: Liens: Child Support.** Under Neb. Rev. Stat. § 42-371 (Cum. Supp. 2012), all orders and judgments for child support in the specified proceedings operate as statutory liens. Such liens attach from the date of the judgment to the obligor's real property and any personal property registered with any county officer, for arrears and as security for future obligations.
6. **Deeds: Conveyances.** A quitclaim deed transfers only the grantor's interest in the property, not the property itself.
7. **Judgments: Debtors and Creditors: Property: Fraud.** Unless a judgment creditor shows that a judgment debtor has fraudulently transferred real property to avoid creditors, the relevant question for the remedy of execution is whether the debtor has any interest in the property.
8. \_\_\_\_: \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Under Neb. Rev. Stat. § 25-1516 (Reissue 2008), a judgment creditor can obtain a writ of execution only to levy on the judgment debtor's personal or real property interests.
9. **Judgments: Liens: Property.** A judgment creditor cannot execute a lien on real property unless the judgment debtor has a legal or equitable interest in the property.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded with directions.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for intervenor-appellant.

Ralph E. Peppard for appellee Mary Fox.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

### SUMMARY

John McWilliams appeals from the district court's order confirming an execution sale of real property located in Omaha, Nebraska, which was formerly owned by Raymond Whitbeck. The court ordered the sale to satisfy a judgment lien against the property held by Mary Fox for Whitbeck's child support arrears. But when the court issued the writ of execution, McWilliams was the record owner—not Whitbeck. He obtained the property through a quitclaim deed and intervened to object to the court's confirmation of the sale. Whitbeck has not filed a brief in this appeal.

McWilliams argues that the court could not order the sheriff to conduct an execution sale because the property was no longer titled in the judgment debtor's name, i.e., Whitbeck's name. We agree. To satisfy a judgment, Nebraska's writ of execution statutes<sup>1</sup> permit a court to order a sheriff to levy a writ of execution upon "the lands and tenements of the debtor." The court lacked authority to order the sheriff to levy the writ on property in which the judgment debtor no longer had an interest, absent any finding that the debtor's transfer of the property was fraudulent. We therefore reverse the court's order confirming the sale and remand the cause with directions for the court to vacate its order.

### BACKGROUND

In 1995, Fox filed an action to establish Whitbeck's paternity of her daughter, who was born in 1993. In 1996, the court entered a paternity decree ordering Whitbeck to pay Fox \$368 per month in child support.

In May 2006, the court issued a writ of execution against Whitbeck's unspecified property to satisfy Fox's child support lien, but it was returned unsatisfied. Sometime in 2006, Fox learned that Whitbeck had conveyed the real property by quitclaim deed to Kimberly Thiem, his girlfriend. Fox said Whitbeck told her that after he learned Fox had a child support lien against the property, he conveyed it to Thiem so that Fox

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<sup>1</sup> See Neb. Rev. Stat. §§ 25-1516 and 25-1518 (Reissue 2008).

would “never get the money.” The quitclaim deed was recorded in 2004 and showed that Whitbeck conveyed the property to Thiem for \$1. In October 2006, Thiem conveyed the property to McWilliams by quitclaim deed. McWilliams testified that Thiem transferred the property to him for \$10,000 that he had previously given to her. But the quitclaim deed stated that Thiem conveyed the property to him for \$1.

In October 2008, Fox filed a second praecipe for an execution on Whitbeck’s property. His child support arrears then totaled \$60,444. Fox alleged that Whitbeck had been in prison since 2006 and that she was unaware of any personal property that he owned. She sought an execution sale of the property that Whitbeck had previously owned. But the sheriff refused to execute the lien on the property without a court order. Fox then filed a motion requesting that the court reopen the case and direct the sheriff to execute on the property titled in McWilliams’ name. She alleged that when the quitclaim conveyances were made, the property was subject to her lien. In November, the court ordered the sheriff to execute on the property.

On December 15, 2008, the sheriff served notice of the writ on Whitbeck. In January 2009, the sheriff filed an affidavit with the court stating that on December 31, the sheriff sold the “interest of Raymond Whitbeck” in the property to Fox, as the highest bidder at the public auction, for \$20,500.

Also in December 2008, Sherry McEwin, Whitbeck’s former spouse, intervened to have the court determine the priority of her child support lien on the property, and she filed objections to the sale. The court determined that her lien had lapsed. We affirmed that ruling on appeal.<sup>2</sup> But because McEwin’s child support judgment gave her an interest in any proceeds that exceeded the amount of Fox’s lien, we remanded the cause for the court to consider McEwin’s objections that the property was sold for less than its fair market value. We issued that mandate in July 2010. In January 2011, McWilliams also intervened. He filed objections to the sale and cross-claims against Fox.

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<sup>2</sup> See *Fox v. Whitbeck*, 280 Neb. 75, 783 N.W.2d 774 (2010).

McWilliams alleged that he was a good faith purchaser who had been deprived of his property without a hearing, in violation of due process requirements and Neb. Rev. Stat. § 25-1521 (Reissue 2008). He specifically alleged that §§ 25-1516 and 25-1518 barred the execution sale because Whitbeck, the debtor, had no interest in the property and Fox had not sought to void Whitbeck's transfer as fraudulent. He also alleged that the statute of limitations barred the execution sale, as did the doctrine of laches. Finally, he alleged that Fox's failure to personally bid on the property was a procedural irregularity. For relief, he asked the court to quiet title in him or to grant him a priority lien for his expenditures: i.e., the alleged purchase price, real estate taxes, and unspecified expenditures.

In March 2012, the court held an evidentiary hearing on McEwin's previous objection to the sale and McWilliams' objections and cross-claims. McEwin did not appear. McWilliams presented evidence about the value of the property, a vacant lot; the maintenance and improvements to the property that he had made; and the property taxes that he had paid. As stated, McWilliams' improved lot was next to the vacant lot. McWilliams presented extensive evidence to support his position that the vacant lot was worth much more than its 2012 assessed value or the price that Fox had paid for it at the execution sale. Given our disposition of the case, however, we do not recount this evidence.

The court rejected all of McWilliams' claims. The court found that the quitclaim deeds had conveyed only the grantors' interests, not the land itself; so the conveyances were subject to Fox's lien. It made the following determinations: (1) the property was sold for a fair price; (2) no irregularities in the execution sale precluded confirmation; and (3) the requirements for confirming an execution sale under Neb. Rev. Stat. § 25-1531 (Reissue 2008) were satisfied.

### ASSIGNMENTS OF ERROR

McWilliams assigns that the court erred as follows: (1) failing to sustain his objections; (2) finding that § 25-1531 was satisfied; (3) determining that the property sold for a fair value;

(4) failing to find that the property would have been sold for more in a subsequent sale; (5) failing to find irregularities in the sale; (6) failing to find that Fox's claim was barred by the statute of limitations; (7) failing to conclude that the doctrine of laches applied; and (8) failing to award McWilliams damages or reimbursement for his expenditures.

### STANDARD OF REVIEW

[1-4] We review a court's order confirming an execution sale or a judicial sale for abuse of discretion.<sup>3</sup> A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.<sup>4</sup> But we independently review questions of law decided by a lower court.<sup>5</sup> Statutory interpretation presents a question of law.<sup>6</sup>

### ANALYSIS

McWilliams contends that under Nebraska law, a court cannot order a sheriff to levy a writ of execution on property that the judgment debtor does not own or possess. He argues that under §§ 25-1516 and 25-1518, a writ of execution can be levied only on the judgment debtor's lands and tenements. And he argues that our case law supports his position.

[5,6] Fox, of course, views the matter differently. Fox premises her argument on two established rules of law. First, under Neb. Rev. Stat. § 42-371 (Cum. Supp. 2012), all orders and judgments for child support in the specified proceedings (including paternity actions) operate as statutory liens. Such liens attach from the date of the judgment to the obligor's real property and any personal property registered with any

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<sup>3</sup> See, *Fox*, *supra* note 2; *Deutsche Bank Nat. Trust Co. v. Siegel*, 279 Neb. 174, 777 N.W.2d 259 (2010); 30 Am. Jur. 2d *Executions and Enforcements of Judgments* § 384 (2005). See, also, § 25-1531.

<sup>4</sup> *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

county officer, for arrears and as security for future obligations.<sup>7</sup> She argues that unless a support lien has lapsed, it may be enforced by execution, the same as any other judgment lien. Second, a quitclaim deed transfers only the grantor's interest in the property, not the property itself.<sup>8</sup> She argues that because the judgment ordering child support was issued against Whitbeck before 2004—when he conveyed the property by quitclaim deed to Thiem—Thiem took the property subject to Fox's lien and transferred it to McWilliams subject to her lien.

[7] Fox's arguments are partly correct. We agree that Fox's lien, for Whitbeck's arrears and future obligations, attached to his property from the date of the judgment and had priority over any subsequent encumbrance of the property. And we agree that Thiem and McWilliams took the property subject to Fox's lien. But unless a judgment creditor shows that a judgment debtor has fraudulently transferred real property to avoid creditors, the relevant question for the remedy of execution is whether the debtor has any interest in the property.

[8] Under Neb. Rev. Stat. § 25-1501 (Reissue 2008), execution is an administrative process; a clerk of the court issues the writ. But under § 25-1516, a judgment creditor can obtain a writ of execution only to levy on the judgment debtor's personal or real property interests:

(1) The writ of execution against the property of the debtor issuing from any court of record in this state shall command the officer to whom it is directed that of the goods and chattels of the debtor he or she cause to be made the money specified in the writ, and for want of goods and chattels he or she cause the same to be made  
*of the lands and tenements of the debtor.*

(Emphasis supplied.)

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<sup>7</sup> See, e.g., *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993); *McCord v. McCord*, 128 Neb. 230, 258 N.W. 474 (1935) (citing *Lynch v. Rohan*, 116 Neb. 820, 219 N.W. 239 (1928)).

<sup>8</sup> See, e.g., *Morello v. Land Reutil. Comm. of Cty. of Douglas*, 265 Neb. 735, 659 N.W.2d 310 (2003). See, also, 5 Richard R. Powell & Michael Allan Wolf, *Powell on Real Property* § 38.05[5] (2000).

Similarly, § 25-1518 requires an officer receiving a writ of execution to attempt to seek a judgment debtor's available personal property first and, if that fails, to execute the lien against the debtor's available real property:

The officer to whom a writ of execution is delivered shall proceed immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found, the officer shall endorse on the writ of execution no goods, and forthwith levy the writ of execution *upon the lands and tenements of the debtor*, which may be liable to satisfy the judgment.

(Emphasis supplied.)

[9] McWilliams argues that a judgment creditor cannot execute a lien on real property unless the judgment debtor has a legal or equitable interest in the property.<sup>9</sup> Fox's argument that this court decided these cases before the Legislature enacted § 42-371 misses the point. The relevant writ of execution statutes have not substantively changed. To obtain an execution sale of the property for a judgment owed by Whitbeck, Fox had to show that Whitbeck still had an interest in the property or that he had fraudulently transferred it.<sup>10</sup> Fox never alleged a fraudulent transfer, and the court's order did not rest upon such findings. We therefore reverse the order and remand the cause with directions for the court to vacate its order confirming the execution sale.

REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, J., not participating.

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<sup>9</sup> See, *Thies v. Weible*, 126 Neb. 720, 254 N.W. 420 (1934); *Flint v. Chaloupka*, 72 Neb. 34, 99 N.W. 825 (1904); *First Nat. Bank of Plattsmouth v. Tighe*, 49 Neb. 299, 68 N.W. 490 (1896).

<sup>10</sup> See, e.g., *United States Nat. Bank v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980); *Weckerly v. Taylor*, 74 Neb. 84, 103 N.W. 1065 (1905).

RONALD G. VLACH, APPELLANT, v.  
RHONDA K. VLACH, APPELLEE.  
835 N.W.2d 72

Filed June 21, 2013. No. S-12-866.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court decides the question independently of the conclusion reached by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
4. **Statutes: Appeal and Error.** In the absence of a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
5. **Attorney Fees: Appeal and Error.** A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.
6. **Declaratory Judgments: Parties.** A declaratory judgment action is to declare the rights, status, or other legal relations between the parties.
7. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
8. **Divorce: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
9. **Attorney Fees.** An award of attorney fees involves consideration of such factors as the nature of the case, the services performed and results obtained, the length of time required for preparation and presentation of the case, the customary charges of the bar, and general equities of the case.

Appeal from the District Court for Dodge County: GEOFFREY C. HALL, Judge. Affirmed.

Donald D. Schneider for appellant.

Susan A. Anderson, of Anderson & Bressman Law Firm, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, STEPHAN, and CASSEL, JJ.

STEPHAN, J.

Ronald G. Vlach brought this declaratory judgment action in 2012. He alleged his 1985 marriage to Rhonda K. Vlach

was invalid because no certificate of marriage was filed with the county clerk. The district court for Dodge County found the marriage was valid and awarded attorney fees to Rhonda. Ronald filed this timely appeal. We affirm the judgment of the district court.

### BACKGROUND

The underlying facts in this case are largely undisputed. Ronald and Rhonda obtained a "License and Certificate of Marriage" form bearing the identifying number "48 - 475" from the Dodge County Court on October 3, 1985. They then participated in a wedding ceremony officiated by a county judge on October 4.

The form referred to above has three sections. The first section is untitled and asks for identifying information about the parties and the officiant. This section of the form before us is mostly completed; only the name of the person performing the ceremony and the names of the witnesses to the ceremony are missing. The second section is entitled "Marriage License." It states, "LICENSE IS HEREBY GRANTED to any person authorized to solemnize marriages according to the laws of said State, to join [the parties] in marriage within Dodge County, Nebraska." The marriage license section of the form requests the names, residences, and dates and places of birth of the parties. It then states, "And the person joining them in marriage is required to make due return of his proceedings to the County Judge of Dodge County within fifteen days." On the form before us, all of the parties' information is included in the marriage license section. In addition, the county judge's name is typed in and the license section of the form is signed by the clerk of the county court.

The third section of the form is entitled "Return of Marriage Ceremony Certificate On License No. 48 - 475" (return). This portion is intended to be completed by the marriage officiant who certifies that he or she joined the parties in marriage in the presence of two witnesses. The return is then to be presented to a county judge and the clerk of the county court for signatures and filing. On the form before us, the return section contains only the name of the county and the marriage

license number. The remainder of the section is blank. It is undisputed that the return was never filed with the State of Nebraska's Department of Health and Human Services, health records management section, previously known as the Bureau of Vital Statistics.

Ronald asked the district court to declare that "no marriage ever existed" because the return was not completed and filed. He asserts that he and Rhonda are not and never have been husband and wife.

In her answer, Rhonda admitted that the parties obtained the marriage license form and that a marriage ceremony occurred. She alleged that the filing of the return is an administrative action and that the failure to do so does not affect the validity of the marriage. She requested that the action be dismissed and that she be awarded attorney fees both pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2008) and "in equity."

Ronald filed a motion for summary judgment. In support of his motion, he offered and the court received (1) a certified copy of the marriage form bearing the completed license but uncompleted return section; (2) a document stating that the State of Nebraska health records management section had no record of the marriage; and (3) Ronald's affidavit, in which he stated that he and Rhonda "held each other out as husband and wife" after the marriage ceremony until his attorney discovered on March 15, 2012, that the return had not been completed.

The court also received several affidavits offered by Rhonda. In one, a former county judge averred that he performed the ceremony and solemnized the marriage of Ronald and Rhonda on October 4, 1985. The judge averred that after the ceremony, he prepared a marriage certificate. The certificate noted the names and addresses of the two witnesses to the marriage and the names, dates of birth, and residences of Ronald and Rhonda. The judge averred that he signed the certificate himself and handed it to Ronald.

In another affidavit, Rhonda averred that she and Ronald were married by the county judge in Fremont, Nebraska, at a ceremony attended by approximately 250 people. At the conclusion of the ceremony, the judge asked the witnesses to

accompany him to a small table at the front of the room, where he asked the witnesses to sign the original marriage certificate. Rhonda's maid of honor confirmed the signing of the certificate at the table. Rhonda averred that when she and Ronald returned from their honeymoon, she asked Ronald what he had done with the original marriage certificate, and he replied that he had placed it in a safe in his office. Rhonda averred that early in the marriage, Ronald retrieved the marriage certificate from the safe to enable Rhonda to travel because she did not have a passport, and that he later insisted that Rhonda return the certificate to him, "claiming that his safe was the most secure location."

In a deposition, Ronald denied that he had the original or a copy of the marriage certificate. Ronald said he had no idea what happened to the marriage license after it was issued. He did not recall whether a marriage certificate was ever signed, and he did not recall ever seeing an original marriage certificate. The court also received the affidavit of Ronald's best man at the wedding, who stated that he did not observe the judge give the certificate to Ronald or Rhonda after the ceremony. The parties stipulated that the entire case could be submitted to the court on the record made at the summary judgment hearing.

The district court entered an order denying Ronald's motion for summary judgment and resolving the merits of the case, which turns on an issue of law: whether a fully executed and duly filed return of a marriage license is a legal requirement for a valid marriage in Nebraska. The court concluded that the requirements for a valid legal marriage, as provided by Neb. Rev. Stat. § 42-104 (Reissue 1984), had been met. The court further determined that the statutes relating to a return of a marriage certificate are "procedural" and "do not constitute substantive requirements for a valid legal marriage under Nebraska law." Finally, the court determined that "the evidence as presented is uncontroverted that the parties have held themselves out as husband and wife since the date of their marriage on October 3, 1985[,] and have continued to do so for the past 26 years." After another evidentiary hearing, the court entered an order awarding Rhonda attorney fees of \$7,500 and taxing

costs to Ronald. Ronald appeals from both orders. We moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.<sup>1</sup>

### ASSIGNMENTS OF ERROR

Ronald assigns, summarized and restated, that the district court erred in (1) finding that a valid marriage existed, (2) finding that a common-law marriage existed between Ronald and Rhonda, and (3) awarding attorney fees to Rhonda.

### STANDARD OF REVIEW

[1] When a declaratory judgment action presents a question of law, an appellate court decides the question independently of the conclusion reached by the trial court.<sup>2</sup>

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.<sup>3</sup>

[3] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.<sup>4</sup>

### ANALYSIS

#### VALIDITY OF MARRIAGE

The Nebraska statutes governing the formation of a marriage are codified at Neb. Rev. Stat. §§ 42-101 to 42-118 (Reissue 2008). Under the version of § 42-104 in effect in 1985, marriage licenses were issued by county courts.<sup>5</sup> The statute was amended in 1986<sup>6</sup> to provide that marriage licenses be issued by county clerks. The amendment also provided that “[a]pplications for a marriage license made with the county court

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<sup>1</sup> See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

<sup>2</sup> *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

<sup>3</sup> *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013).

<sup>4</sup> *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

<sup>5</sup> § 42-104 (Reissue 1984).

<sup>6</sup> 1986 Neb. Laws, L.B. 525, § 4.

prior to the operative date of this act [January 1, 1987], shall be processed and licenses shall be issued by the county court according to the law and procedures in effect on the date each application was made.”<sup>7</sup>

Thus, we are governed by the law in effect in 1985. At that time, § 42-104 provided that “no marriage hereafter contracted shall be recognized as valid unless [a] license has been previously obtained, and unless such marriage is solemnized by a person authorized by law to solemnize marriages.”<sup>8</sup> The current version of the statute is the same except for the additional provision that the license must be “used within one year from the date of issuance.”<sup>9</sup>

[4] In the absence of a statutory indication to the contrary, this court gives words in a statute their ordinary meaning.<sup>10</sup> The plain language of § 42-104, both at the time of the Vlachs’ application for a marriage license and today, includes only two requirements for a marriage to be valid: the issuance of a marriage license and the subsequent solemnization of the marriage by a person authorized to do so.

And this is how we have construed the statute. In *Collins v. Hoag & Rollins*,<sup>11</sup> we reversed the Workers’ Compensation Court’s holding that a common-law wife could receive workers’ compensation benefits for her deceased common-law husband. This court determined that the statutory language of § 42-104 was “clearly intended to prohibit and make invalid any marriage in this state unless a license was first obtained and the marriage solemnized by a person authorized to solemnize marriages.”<sup>12</sup> In a companion divorce case, *Walden v.*

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<sup>7</sup> *Id.*

<sup>8</sup> § 42-104 (Reissue 1984).

<sup>9</sup> § 42-104 (Reissue 2008).

<sup>10</sup> *Mutual of Omaha Bank v. Murante*, 285 Neb. 747, 829 N.W.2d 676 (2013); *Credit Bureau Servs. v. Experian Info. Solutions*, 285 Neb. 526, 828 N.W.2d 147 (2013).

<sup>11</sup> *Collins v. Hoag & Rollins*, 122 Neb. 805, 241 N.W. 766 (1932).

<sup>12</sup> *Id.* at 808, 241 N.W. at 768.

*Walden*,<sup>13</sup> we affirmed a trial court's determination that there was no valid marriage because there had been no solemnization ceremony as required by § 42-104, even though the parties had cohabited and held themselves out as husband and wife for a considerable period.

It is undisputed that the two requirements for a valid marriage were met in this case. A marriage license was issued, and on the following day, the marriage was solemnized by a county judge authorized to perform marriages. But Ronald contends that a third requirement was not met: the execution and filing of the license and return. His argument is based on the following statutes as they existed in 1985. Section 42-108 provided that persons performing a marriage ceremony

shall make a return of his or her proceedings in the premises, showing the names and residences of at least two witnesses who were present at such marriage, which return shall be made to the county judge who issued the license within fifteen days after such marriage has been performed, which return the county judge shall record or cause to be recorded in the same book where the marriage license is recorded.

Section 42-106 required county judges to maintain records of marriages licenses issued, and § 42-112 provided that county judges "shall record all such returns of such marriages in a book to be kept for that purpose within one month after receiving the same." Section 42-115 required religious societies joining their members in marriage to complete and file a certificate of the marriage in a similar fashion.

Ronald argues that because these statutes use the word "shall" in referring to the obligation of the officiant to complete and file the return, the marriage is invalidated if the officiant does not comply. We disagree. If the Legislature intended such an outcome, it could have included the completion and filing of the return as a third requirement in § 42-104. We find no indication in the statutes that the Legislature intended to penalize the parties to a duly licensed and solemnized marriage

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<sup>13</sup> *Walden v. Walden*, 122 Neb. 804, 241 N.W. 766 (1932).

for an officiant's subsequent failure to complete and file the return.<sup>14</sup> The purpose of the return is to provide an official record that the solemnization ceremony was performed. This is evident based on § 42-116, which provides that the original or a certified copy of the license "shall be received in all courts and places as presumptive evidence of the fact of such marriage." In the absence of the certificate, parties would be required to prove the existence of the marriage by some other means, as they did in this case.

We agree with the district court that all statutory requirements were met and that the marriage of Ronald and Rhonda was valid. For completeness, we address Ronald's argument that the district court erred in determining that the parties had entered into a common-law marriage. We agree that common-law marriages are not recognized in Nebraska.<sup>15</sup> But we do not read the district court's order as recognizing a common-law marriage. Rather, it was simply stating that the parties had held themselves out as husband and wife. The court specifically determined that the legal requirements for a valid marriage as set forth in § 42-104 were met. As noted above, we agree.

#### ATTORNEY FEES

[5] Having determined that the district court correctly decided the merits of the case in Rhonda's favor, we turn to Ronald's argument that it abused its discretion in awarding her attorney fees in the amount of \$7,500. A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.<sup>16</sup> Rhonda sought an award of attorney fees both pursuant to § 25-824, which allows attorney fees in frivolous actions, and in equity. The district court did not specify the legal basis for its award of attorney fees.

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<sup>14</sup> See § 42-113 (Reissue 1984).

<sup>15</sup> See, *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984); *Ropken v. Ropken*, 169 Neb. 352, 99 N.W.2d 480 (1959).

<sup>16</sup> *Eikmeier v. City of Omaha*, 280 Neb. 173, 783 N.W.2d 795 (2010); *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[6,7] A declaratory judgment action is to declare the rights, status, or other legal relations between the parties.<sup>17</sup> An action for declaratory judgment is *sui generis*; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.<sup>18</sup> Here, the nature of the declaratory judgment action is the determination of the marital status of the parties. Accordingly, we conclude that entitlement to attorney fees should be governed by the law applicable to the dissolution of marriage.

[8,9] In an action for the dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed *de novo* on the record, and will be affirmed in the absence of an abuse of discretion.<sup>19</sup> Such an award of attorney fees involves consideration of such factors as the nature of the case, the services performed and results obtained, the length of time required for preparation and presentation of the case, the customary charges of the bar, and general equities of the case.<sup>20</sup>

Based on our review of the record, we find no abuse of discretion in the award of attorney fees under the district court's equity jurisdiction in domestic relations matters. Accordingly, we need not determine whether Ronald's action was "frivolous" within the meaning of § 25-824.

## CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

CONNOLLY and MILLER-LERMAN, JJ., participating on briefs.  
McCORMACK, J., not participating.

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<sup>17</sup> Neb. Rev. Stat. § 25-21,149 (Reissue 2008); *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998).

<sup>18</sup> *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011); *Wetovick v. County of Nance*, *supra* note 16.

<sup>19</sup> *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

<sup>20</sup> See *id.*

CENTURION STONE OF NEBRASKA, APPELLEE,  
V. LAWRENCE WHELAN AND JANE  
WHELAN, APPELLANTS.  
835 N.W.2d 62

Filed June 21, 2013. No. S-12-1022.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. \_\_\_\_: \_\_\_\_\_. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.

Appeal from the District Court for Douglas County, THOMAS A. OTEPKA, Judge, on appeal thereto from the County Court for Douglas County, CRAIG Q. McDERMOTT, Judge. Judgment of District Court reversed, and cause remanded with directions.

Lawrence G. Whelan and Dennis G. Whelan, of Whelan Law Office, and Dana C. Bradford III, of Bradford & Coenen, L.L.C., for appellants.

Joseph J. Skudlarek for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and CASSEL, JJ.

HEAVICAN, C.J.

## INTRODUCTION

After having judgment entered against them by the county court, Lawrence Whelan and Jane Whelan appealed to the district court, acting as an intermediate court of appeals. As part of that appeal, the Whelans offered into evidence the bill of exceptions created before the county court. Subsequent to the appeal hearing, the district court became aware that the county court's bill of exceptions was incomplete. Due to the

incomplete bill, the district court reviewed only the pleadings and affirmed the judgment of the county court. The Whelans appeal. We reverse, and remand with directions.

### BACKGROUND

The Whelans entered into a contract for services and supplies with Centurion Stone of Nebraska (Centurion Stone). Disputes arose surrounding the contract. Centurion Stone filed suit against the Whelans for breach of contract and quantum meruit, seeking \$15,973.58. The Whelans filed a counterclaim. Following a jury trial, judgment was entered for Centurion Stone and against the Whelans in the amount of \$8,256.75.

The Whelans appealed this judgment to the Douglas County District Court. At a hearing before the district court, the Whelans asked the district court to take judicial notice of the county court transcript and offered exhibit 1, which was the bill of exceptions of the proceedings before the county court.

Subsequently, Centurion Stone filed a motion to dismiss the Whelans' appeal and pointed out the incompleteness of the bill of exceptions, specifically that tape 17 had been lost and, with it, several hours of testimony. A hearing was held on that motion on July 19, 2012. During the hearing, Lawrence, who is a licensed attorney representing himself and his wife, Jane, acknowledged that as of the date of the appeal hearing, he was aware of certain deficiencies in the county court record.

After taking the matter under advisement, the district court entered an order stating:

Our Supreme Court has held that it is "incumbent upon the Appellant to present a record which supports the errors assigned." [Citation omitted.] Their opportunity to do so was at the time of the appeal which they instituted and they did not. Rather, knowing that the Bill of Exceptions (Ex. 1) was not complete before the hearing, Appellants marked and offered it as an exhibit, representing it as the complete record and asked this Court to rely upon it and reverse the County Court.

The district court then reviewed the pleadings and concluded that they supported the county court's judgment. The district court also noted that the Whelans' statement of errors was filed out of time, but noted that even if the late statement of errors was allowed, the record still did not support the Whelans' appeal.

### ASSIGNMENTS OF ERROR

The Whelans assign that the district court erred in (1) failing to order the county court to complete the record or, in the alternative, to remand the case to the county court for a new trial, and (2) finding that the pleadings supported the judgment of the county court.

### STANDARD OF REVIEW

[1,2] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.<sup>1</sup> When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.<sup>2</sup>

[3] However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.<sup>3</sup>

### ANALYSIS

[4] We turn first to the Whelans' contention that the district court erred when it failed to remand this case to the county court for a new trial. As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.<sup>4</sup> We have applied this rule against appellants in situations where the

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<sup>1</sup> *Schinnerer v. Nebraska Diamond Sales Co.*, 278 Neb. 194, 769 N.W.2d 350 (2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Intercall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

appellant has failed to properly create or request the record before the trial court by simply examining whether the pleadings supported the trial court's judgment.<sup>5</sup>

But the rule is different where the fault for the lack of an appellate record cannot be assigned to the parties. In *Terry v. Duff*,<sup>6</sup> the court was unable to locate the bill of exceptions. Though it was unclear whether the bill had been lost by the clerk of the court or by one or other of the parties, this court vacated the trial court's judgment and remanded the cause for a new trial. And in *State v. Slezak*,<sup>7</sup> the lack of a bill of exceptions was attributed to the court reporter. We remanded the cause to the district court with directions to order the county court to prepare a new bill.<sup>8</sup> And quite recently, in *Hynes v. Good Samaritan Hosp.*,<sup>9</sup> this court vacated a judgment and remanded the cause for a new trial when, through no fault of the parties, none of the testimony presented by the defendant was preserved for appellate review.

In this case, the parties agree that the incomplete record was the fault of the county court. Moreover, the district court was informed and aware of the incomplete record prior to reaching its decision. The district court should have ordered the county court to file a complete bill of exceptions by any manner deemed appropriate by the county court, including, if necessary, holding a new trial in the county court. The district court's failure to do so was error.

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<sup>5</sup> See, e.g., *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997) (bill not part of appellate record); *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994) (bill incomplete); *Scottsbluff Typewriter Leasing v. Beverly Ent.*, 230 Neb. 699, 432 N.W.2d 844 (1988) (bill incomplete); *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979) (no bill of exceptions created); *Boosalis v. Horace Mann Ins. Co.*, 198 Neb. 148, 251 N.W.2d 885 (1977) (bill incomplete); *Rhodes v. Johnstone*, 191 Neb. 552, 216 N.W.2d 168 (1974) (no bill created or praecipe filed); *Jones v. City of Chadron*, 156 Neb. 150, 55 N.W.2d 495 (1952) (no bill created or authenticated).

<sup>6</sup> *Terry v. Duff*, 246 Neb. 11, 516 N.W.2d 591 (1994).

<sup>7</sup> *State v. Slezak*, 230 Neb. 197, 430 N.W.2d 533 (1988).

<sup>8</sup> *Id.* See, also, *State v. Benson*, 199 Neb. 549, 260 N.W.2d 208 (1977).

<sup>9</sup> *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013).

We reverse, and remand with directions to the district court to order the county court to file a complete bill of exceptions with the district court or, in the alternative, to hold a new trial. As such, we need not address the Whelans' second assignment of error.

### CONCLUSION

The order of the district court affirming the judgment of the county court is reversed, and the cause is remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V.  
DEAN L. OSBORNE, APPELLANT.  
835 N.W.2d 664

Filed June 28, 2013. No. S-12-112.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
3. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

Petition for further review from the Court of Appeals, IRWIN, PIRTLE, and RIEDMANN, Judges, on appeal thereto from the District Court for Saunders County, MARY C. GILBRIDE, Judge, on appeal thereto from the County Court for Saunders County, MARVIN V. MILLER, Judge. Judgment of Court of Appeals affirmed.

Cynthia R. Lamm, of Law Office of Cynthia R. Lamm, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, STEPHAN, and MILLER-LERMAN, JJ.

PER CURIAM.

### NATURE OF CASE

This case is before us on further review of the decision of the Nebraska Court of Appeals. See *State v. Osborne*, 20 Neb. App. 553, 826 N.W.2d 892 (2013). Dean L. Osborne was convicted in the county court for Saunders County of third degree sexual assault and admitting a minor to an obscene motion picture, show, or presentation. The district court affirmed. The Court of Appeals affirmed the third degree sexual assault conviction, but reversed the obscenity-related count. We granted Osborne's petition for further review; neither party challenges the reversal of the obscenity-related conviction on further review. Osborne claims that the Court of Appeals erred when it failed to find that (1) there was not sufficient evidence to support his conviction for third degree sexual assault and (2) he received ineffective assistance of trial counsel. We affirm the decision of the Court of Appeals.

### STATEMENT OF FACTS

The underlying facts of this case are set forth in greater detail in the Court of Appeals' opinion. See *id.* Generally, Osborne was convicted in the county court for Saunders County of third degree sexual assault, Neb. Rev. Stat. § 28-320(1) (Reissue 2008), and admitting a minor to an obscene motion picture, show, or presentation, Neb. Rev. Stat. § 28-809 (Reissue 2008). The charges against Osborne arose from events involving the alleged victim, A.H., which occurred during the second half of 2009. The district court affirmed his convictions.

On appeal to the Court of Appeals, Osborne claimed that the district court erred in various respects, including when it found that there was sufficient evidence to support his convictions and when it determined that the record was insufficient to review his claims of ineffective assistance of trial counsel. The Court of Appeals concluded that there was not sufficient evidence

to support Osborne's conviction for admitting a minor to an obscene motion picture, show, or presentation. The Court of Appeals reversed this conviction and remanded the cause with directions to dismiss the charge. The Court of Appeals, however, concluded that there was sufficient evidence to support the conviction for third degree sexual assault and affirmed that conviction. The Court of Appeals did not address Osborne's other claims, including the claim related to ineffective assistance of trial counsel. One member of the three-judge panel dissented from that portion of the opinion which affirmed the third degree sexual assault conviction. The dissenting opinion generally asserts that the record does not support a finding that Osborne's acts in touching the victim were for sexual arousal or gratification as required by Neb. Rev. Stat. § 28-318(5) (Reissue 2008).

We granted Osborne's petition for further review.

### ASSIGNMENTS OF ERROR

Osborne claims that the Court of Appeals erred when it (1) concluded that there was sufficient evidence to support his conviction for third degree sexual assault and (2) failed to address his claims of ineffective assistance of trial counsel.

### STANDARDS OF REVIEW

[1,2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id.*

### ANALYSIS

With regard to the sufficiency of the evidence to support Osborne's conviction for third degree assault, having reviewed the briefs and record and having heard oral arguments, and considering the relevant standard of appellate review, we

conclude on further review that the decision of the Court of Appeals in *State v. Osborne*, 20 Neb. App. 553, 826 N.W.2d 892 (2013), is not erroneous. Accordingly, we affirm the decision of the Court of Appeals which affirmed the portion of the district court's order in which it affirmed Osborne's conviction for third degree sexual assault.

With regard to Osborne's claims related to the alleged ineffectiveness of trial counsel, we note that the Court of Appeals did not discuss this claim. In contrast, the district court sitting as an appellate court did consider effectiveness of trial counsel and stated that it would not "address the ineffective counsel issues on this direct appeal as an evidentiary hearing would be required for such a review."

[3] We have often stated that an ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Watt, supra*. The district court determined that an evidentiary hearing would be required, and we agree with the district court's assessment of the record. We treat the Court of Appeals' silence on the issue as its indication that the ineffective assistance of trial counsel issue could not be reached on direct appeal on the existing record, and so construed, we agree.

### CONCLUSION

On further review, we affirm the decision of the Court of Appeals.

AFFIRMED.

CONNOLLY and McCORMACK, JJ., participating on briefs.  
CASSEL, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.  
MICHAEL M. DIXON, APPELLANT.  
835 N.W.2d 643

Filed June 28, 2013. No. S-12-791.

1. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall have the assistance of counsel for his or her defense.

2. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. An indigent criminal defendant's Sixth Amendment right to counsel does not include the right to counsel of the indigent defendant's own choice.
3. **Rules of the Supreme Court: Right to Counsel.** Neb. Ct. R. of Prof. Cond. § 3-501.2(d) (rev. 2008) provides that a limited appearance may be entered by a lawyer only when a person is not represented.
4. **Right to Counsel: Waiver: Effectiveness of Counsel.** Counsel appointed to an indigent defendant must remain with the defendant unless one of three conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.
5. **Criminal Law: Courts: Right to Counsel: Time.** A district court has discretion in determining the amount of time to allow a criminal defendant to attempt to retain private counsel.
6. **Criminal Law: Right to Counsel: Time.** Where a criminal defendant is financially able to hire an attorney, he or she may not use his or her neglect in hiring one as a reason for delay.
7. **Effectiveness of Counsel: Proof.** In order to establish whether a defendant was denied effective assistance of counsel, the defendant must first demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Second, the defendant must show that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Appeal and Error.** A party cannot complain of error which he or she has invited the court to commit.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Steffanie J. Garner Kotik, of Kotik & McClure Law, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

## INTRODUCTION

Michale M. Dixon pled no contest to the unauthorized use of a financial transaction device with a value between \$500

and \$1,500. Dixon was found to be a habitual criminal and was sentenced to 10 to 20 years' imprisonment. On appeal, Dixon claims that her Sixth Amendment right to counsel was denied when private counsel was prohibited from entering a limited appearance in her case. Dixon further claims that her trial counsel was ineffective and that the district court erred in sentencing her on the same day it accepted her plea. We affirm the decision of the district court.

### FACTUAL BACKGROUND

The facts of this case are not contested. On April 9, 2012, Dixon was charged with the unauthorized use of a financial transaction device with a value between \$500 and \$1,500, and with another offense in a separate case. The information filed in this case alleges that on or about December 15, 2011, Dixon used a bank debit card which was not hers for the purpose of obtaining money or credit with intent to defraud or without the authorization of the owner of the debit card. The public defender's office was appointed to represent Dixon on both sets of Dixon's offenses, because she was found to be indigent.

On June 28, 2012, the public defender and the prosecutor assigned to this case appeared before the district court, with Dixon present, and informed the court that they both had been contacted repeatedly by attorney Frank Robak, Sr., about the case. The public defender and the prosecutor informed the court that Robak had been paid a retainer fee by Dixon's fiancé to represent Dixon, but had not entered a formal appearance in the case. Dixon reported to the public defender that she had paid Robak enough money for him to enter a plea on Dixon's behalf, but that Robak was requesting more money to proceed with a jury trial. The public defender further explained that Dixon had requested a continuance in the case so that Dixon could gather the funds necessary to retain Robak and proceed with trial. The prosecutor informed the court that she had no objection to the continuance of the matter so that Dixon could obtain funds to retain Robak for representation.

The court allowed for the continuance, and Dixon waived all of her rights to a speedy trial on the record. The court further

explained to Dixon that because Robak had never entered an appearance in the case, he was not currently representing Dixon and that the public defender was her current counsel. A status hearing was scheduled for July 24, 2012, for the parties to inform the court as to whether Dixon was able to retain Robak.

On July 18, 2012, Robak filed a "Limited Appearance of Counsel" on behalf of Dixon for the "limited purpose of attempting immediate resolution of this case without necessity of a trial or complex hearings." A week after this filing, on July 24, the court conducted the scheduled status hearing with the public defender and the prosecutor present. Robak was not present at the hearing. The court reported on the record that Robak confirmed with the court and the various parties in chambers the week prior that he would not be representing Dixon and that he would be withdrawing his limited appearance. The court further noted that pursuant to Neb. Ct. R. of Prof. Cond. § 3-501.2(d) (rev. 2008), a limited appearance may be entered by a lawyer only when a party is not represented and that it considered Robak's limited appearance a "nullity," regardless of whether Robak was going to withdraw it. The court then made a docket entry reflecting this finding.

On July 30, 2012, the public defender and the prosecutor appeared before the district court again, with Dixon present, to address Robak's continued contact with Dixon. According to Dixon's public defender, Robak continued to communicate with Dixon regarding the case. The public defender reported Robak had instructed Dixon to inform the court that Dixon supported his limited appearance and that the court should take notice of this. The court refused to take such notice, again noting that "a person may enter a limited appearance for a person who is not represented" and that "Dixon is represented." The court further instructed Dixon that Robak had to fully represent her or not represent her at all. The court explained to Dixon that Robak had previously told the court in chambers prior to the July 24 status hearing that he would represent Dixon in seeking a plea, but not if the case went

to trial. However, there was no plea offer before the court. Thus, the court found Robak was not representing Dixon. Dixon's case was then placed on the court's trial list for the September term.

On August 1, 2012, the court sent a letter to Robak, with copies to the prosecutor and the public defender. The letter stated that the court understood that Robak was going to withdraw his limited appearance, as he had indicated at the July 18 in-chambers meeting, but that he had failed to do so. The letter further reported that the Nebraska rules on limited representation do not permit a lawyer to enter a limited appearance on behalf of a person who is represented by counsel. The letter contained a copy of § 3-501.2(d) and explained that the public defender was Dixon's current attorney unless the court specifically gave the public defender permission to withdraw from the case.

On August 30, 2012, Dixon pled no contest to the unauthorized use of a financial device with a value between \$500 and \$1,500. The court found that Dixon understood her rights and the consequences of waiving those rights and that Dixon's waiver was freely, voluntarily, knowingly, and intelligently given. The court accepted Dixon's plea. In exchange for Dixon's plea of no contest, the offense charged in Dixon's other case was dismissed. Dixon then reported to the court that she was satisfied with the job the public defender had done in this matter. After the court accepted Dixon's plea, it asked Dixon if she wanted to be sentenced that day. Dixon answered affirmatively and confirmed she had discussed this with counsel.

An enhancement hearing was then held, and the prosecution entered five exhibits into evidence relating to Dixon's various prior convictions. The exhibits demonstrated that in 2000, Dixon was sentenced to two separate terms of imprisonment for 1 to 3 years, to run concurrently, for two counts of second degree forgery; in 2005, Dixon was sentenced to two separate terms of imprisonment for 6 to 10 years, to run concurrently, for burglary and criminal possession of a financial transaction device. Dixon objected to the admittance of the exhibits

related to her 2000 convictions. Dixon claimed those convictions were currently on appeal for the reason that she was not aware in 2000 that she could have transferred those cases to juvenile court. As such, Dixon argued those convictions could not be used for enhancement purposes. Dixon also objected to the exhibits related to her 2005 convictions. She asserted that the past convictions established by those exhibits were also not appropriate for enhancement purposes because she was presently serving sentences for those convictions.

The court found all of Dixon's objections to be collateral attacks on the earlier judgments. The court then found Dixon to be a habitual criminal for purposes of enhancement and sentenced Dixon to 10 to 20 years' imprisonment. Dixon timely appealed.

#### ASSIGNMENTS OF ERROR

Dixon assigns that (1) the district court committed reversible error by denying her Sixth Amendment right to counsel of her choosing by not allowing Robak to appear in the case, (2) she received ineffective assistance of counsel in that her public defender failed to file an interlocutory appeal challenging the denial of the entry of appearance of Robak, and (3) the district court erred in proceeding with sentencing on the same day as the plea hearing because there were unresolved post-conviction proceedings that would have affected the sentence in this matter.

#### STANDARD OF REVIEW

When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.<sup>1</sup>

Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.<sup>2</sup> To prevail on a claim of ineffective assistance of counsel

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<sup>1</sup> *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

<sup>2</sup> *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

under *Strickland v. Washington*,<sup>3</sup> the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. With regard to the question of counsel's performance or prejudice to the defendant as part of the two-pronged test, an appellate court reviews such legal determinations independently of the lower court's decision.<sup>4</sup>

## ANALYSIS

### *Sixth Amendment Right to Counsel.*

In her first assignment of error, Dixon argues that the district court denied her Sixth Amendment right to counsel of her choosing by not allowing Robak to enter a limited appearance in this case. Dixon's argument is without merit.

[1,2] The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his [or her] defence." This court has held that an indigent criminal defendant's Sixth Amendment right to counsel does not include the right to counsel of the indigent defendant's own choice.<sup>5</sup> On appeal, Dixon does not contest that she was found to be indigent. As such, Dixon's argument regarding her choice of counsel is without merit.

[3] Nor did the court err in prohibiting Robak from entering a limited appearance on Dixon's behalf. Section 3-501.2(d) provides that a limited appearance may be entered by a lawyer only when a person is not represented. In this case, Dixon was represented throughout the proceedings. As such, the court did not err in finding Robak's limited appearance to be a nullity.

[4] Furthermore, this court has held that counsel appointed to an indigent defendant must remain with the defendant unless one of three conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and

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<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>4</sup> See *Moyer*, *supra* note 2.

<sup>5</sup> *State v. Bustos*, 230 Neb. 524, 432 N.W.2d 241 (1988).

chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.<sup>6</sup> At no time throughout her proceedings did Dixon waive her right to her appointed public defender and choose to proceed pro se, nor does the record reflect that Dixon reported to the court that her appointed counsel was incompetent.

[5,6] The record establishes, however, that Dixon expressed her desire to the court to retain Robak as private counsel to replace her assigned public defender and asked the court for a continuance to obtain funds to hire Robak. We have held that a district court has discretion in determining the amount of time to allow a criminal defendant to attempt to retain private counsel.<sup>7</sup> We have further held that “[w]here a criminal defendant is financially able to hire an attorney, he or she may not use his or her neglect in hiring one as a reason for delay.”<sup>8</sup>

Dixon’s public defender, the prosecution, and the court did not object to Dixon’s request to retain Robak. Dixon’s request for a continuance was granted, and the court, within its discretion, allowed Dixon almost a month’s time to gather the funds Robak had requested for full representation. The court explained to Dixon that because Robak had never entered an appearance in the case, he was not currently representing Dixon, and that the public defender was still her current counsel. Therefore, the public defender was required to remain with Dixon unless and until Dixon successfully retained Robak.<sup>9</sup> But as expressed by Robak himself, Dixon failed to gather funds to retain Robak.

During the continuance and while the public defender continued to represent Dixon, Robak filed his “Limited Appearance of Counsel” on behalf of Dixon. Subsequent to his filing, Robak reported to the court that Dixon could not pay him his requested fees for full representation and that he would be

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<sup>6</sup> *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

<sup>7</sup> See *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989).

<sup>8</sup> *Id.* at 420, 436 N.W.2d at 518.

<sup>9</sup> *Sandoval*, *supra* note 6.

withdrawing his limited appearance. Citing to § 3-501.2(d), the court found Robak's limited appearance to be a nullity and continued to deny Robak's attempts to make a limited appearance on Dixon's behalf.

As Dixon's attempts to gather funds to retain Robak were unsuccessful, Dixon remained represented by her public defender at all times in this matter. Thus, as Dixon was represented by the public defender, pursuant to § 3-501.2(d), the court did not err in finding Robak's limited appearance to be a nullity and in denying Robak's continued attempts to enter a limited appearance on Dixon's behalf. Dixon's first assignment of error is without merit.

*Ineffective Assistance of Counsel.*

[7] In her second assignment of error, Dixon claims that her public defender was ineffective because she failed to file an interlocutory appeal when the district court did not allow Robak to enter a limited appearance. In order to establish whether a defendant was denied effective assistance of counsel, the defendant must first demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Second, the defendant must show that he or she was prejudiced by the actions or inactions of her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.<sup>10</sup>

Because the district court correctly found that Robak's limited appearance was invalid pursuant to Nebraska law, there was no pertinent issue for her public defender to appeal. Because Dixon has failed to show how her counsel was deficient, she was not prejudiced. Dixon's second assignment of error is without merit.

*Dixon's Sentencing.*

In her final assignment of error, Dixon asserts that the district court erred in sentencing her on the same day that her

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<sup>10</sup> *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

plea was taken. Dixon contends that the objections she made at her enhancement hearing related to her past convictions demonstrated to the court that certain issues on appeal could affect the enhancement of her sentence. Dixon argues here that the court should have waited until those matters were decided before sentencing her.

[8] The district court confirmed with Dixon, however, that she wanted to be sentenced on the same day her plea was taken and that she had discussed this with counsel. “It has long been the rule in this state that a party cannot complain of error which he [or she] has invited the court to commit.”<sup>11</sup> Dixon’s final assignment of error is without merit.

### CONCLUSION

We affirm Dixon’s conviction and sentence.

AFFIRMED.

McCORMACK, J., participating on briefs.

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<sup>11</sup> *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 85, 516 N.W.2d 623, 624 (1994).

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STATE OF NEBRASKA, APPELLEE, v.  
JASON L. MARKS, APPELLANT.  
835 N.W.2d 656

Filed June 28, 2013. No. S-12-931.

1. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
2. **Postconviction: Constitutional Law.** A trial court’s ruling that a petitioner’s allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner’s constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.
3. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.

4. **Postconviction.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable.
5. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
6. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
7. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
8. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
9. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
10. **Effectiveness of Counsel.** In addressing the "prejudice" component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, a court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
11. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, there must be a reasonable probability that but for the petitioner's counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
12. **Effectiveness of Counsel: Appeal and Error.** When a case presents layered claims of ineffective assistance of counsel, an appellate court determines whether the petitioner was prejudiced by his or her appellate counsel's failure to raise issues related to his or her trial counsel's performance. If the trial counsel did not provide ineffective assistance, then the petitioner cannot show prejudice from the appellate counsel's alleged ineffectiveness in failing to raise the issue on appeal.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Affirmed.

Thomas J. Garvey for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

### NATURE OF CASE

Jason L. Marks was convicted of first degree murder and use of a firearm to commit a felony. He was sentenced to life imprisonment for first degree murder and to a consecutive term of 5 to 10 years' imprisonment on the firearm conviction. We affirmed his convictions in *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995) (*Marks I*), but his sentence on the firearm conviction was twice vacated, and the cause remanded to the district court to correct the amount of credit for time served. See, also, *State v. Marks*, 265 Neb. xxii (No. S-02-1320, Apr. 9, 2003). Marks was represented by the same counsel at trial and on these appeals. Marks filed an amended motion for post-conviction relief, which the district court denied without an evidentiary hearing. Marks appeals. Marks is represented by new counsel in the current postconviction case. Because Marks failed to allege facts that show he was entitled to relief and the record refutes his claims, we affirm.

### STATEMENT OF FACTS

On May 9, 1994, Marks was charged by information with first degree murder and use of a firearm to commit a felony in connection with the shooting death of Arthur Godbolt. The facts of Marks' underlying case are set forth in detail in *Marks I*.

On the night of the shooting, Marks, Wade Stewart, and Shawn King were driving a vehicle owned by Stewart's mother. Stewart was driving, King was in the front passenger seat, and Marks was in the back seat. In *Marks I*, we stated that Marks testified that while they were driving,

he saw the victim's car and saw people standing by it.  
As they started driving toward the victim's car, King

started firing, so Marks . . . opened fire. Marks said that after he saw the victim's car, he figured that his group would be shot at. He claimed that it was dark and that he did not see anyone in the area where he was aiming. He stated that after King started firing, he saw people by the car run back toward the sidewalk and the house, and he claimed that he was not thinking, but was just shooting at the car. As they drove away, Marks looked back and said, "Somebody fell." He thought he might have accidentally hit someone.

248 Neb. at 596, 537 N.W.2d at 343.

After a jury trial, Marks was found guilty on both counts. On November 30, 1994, he was sentenced to life imprisonment for first degree murder and to a consecutive term of 5 to 10 years' imprisonment on the firearm conviction. Marks' convictions were affirmed in *Marks I*, but we twice vacated the sentence for the use of a firearm conviction and remanded the cause to the district court to correct the amount of credit for time served. Marks was represented by the same counsel at trial and on these appeals.

Marks filed an amended motion for postconviction relief by new counsel on February 22, 2012. This postconviction proceeding gives rise to the instant appeal. In his amended motion, Marks alleged that he was entitled to postconviction relief based on what he styled as "judicial misconduct," primarily because the district court excused a juror and replaced him with an alternate juror when Marks was not present. Marks styled additional claims as "prosecutorial misconduct," primarily alleging that the prosecution failed to advise defense counsel of the existence of evidence regarding a bullet hole in the vehicle in which Marks was riding on the night of the shooting. Marks alleged various other claims based on purported denial of effective assistance of counsel, including that trial counsel failed to investigate aspects of the case, failed to call certain witnesses, failed to file motions in limine and to suppress, failed to request an intoxication defense instruction, and failed to object to proposed jury instructions. Marks alleged that his appellate counsel was ineffective because he failed to raise the foregoing issues on direct appeal.

In its September 14, 2012, order, the district court denied Marks' motion for postconviction relief without an evidentiary hearing. The district court reasoned that Marks' claims of ineffective assistance of trial and appellate counsel were without merit generally because Marks failed to allege sufficient facts to show prejudice or the record refuted his claims.

Marks appeals.

### ASSIGNMENT OF ERROR

Marks claims, restated, that the district court erred when it denied his motion for postconviction relief without an evidentiary hearing.

### STANDARD OF REVIEW

[1-3] In appeals from postconviction proceedings, we independently resolve questions of law. *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012). A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief. *Id.* Thus, in appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012); *State v. Edwards*, *supra*.

### ANALYSIS

Marks claims on appeal that the district court erred when it denied postconviction relief without conducting an evidentiary hearing. We find no merit to Marks' assignment of error.

[4,5] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010); *State v. York*, 278 Neb.

306, 770 N.W.2d 614 (2009). Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

[6,7] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Watkins*, *supra*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id.*

In his amended motion for postconviction relief, Marks styled his allegations as "judicial misconduct," "prosecutorial misconduct," and ineffective assistance of trial and appellate counsel. However, upon closer reading of the motion, all of his allegations are more accurately characterized as claims of ineffective assistance of counsel. Accordingly, our analysis is limited to the principles applicable to ineffective assistance of counsel claims. In particular, we examine the allegations in the motion to see if there is an alleged factual basis on which a court could conclude that the judgment was void or voidable. We also examine the record to determine whether the district court was correct when it determined that Marks was entitled to no relief.

[8,9] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. See *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013). To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Robinson*, *supra*. An appellate court may

address the two prongs of this test, deficient performance and prejudice, in either order. *Id.*

[10,11] In addressing the “prejudice” component of the *Strickland* test, a court focuses on whether a trial counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* To show prejudice under the prejudice component of the *Strickland* test, there must be a reasonable probability that but for the petitioner’s counsel’s deficient performance, the result of the proceeding would have been different. *State v. Robinson, supra*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

[12] Because Marks’ trial counsel was also his appellate counsel, this is his first opportunity to assert claims that his trial counsel provided ineffective assistance. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012). These claims are layered ineffectiveness claims—i.e., a claim that his appellate counsel was ineffective for failing to raise claims of his trial counsel’s ineffective assistance. When a case presents layered claims of ineffective assistance of counsel, we determine whether the petitioner was prejudiced by his or her appellate counsel’s failure to raise issues related to his or her trial counsel’s performance. *Id.* See, also, *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). If the trial counsel did not provide ineffective assistance, then the petitioner cannot show prejudice from the appellate counsel’s alleged ineffectiveness in failing to raise the issue on appeal. See *id.*

As noted, we treat Marks’ numerous allegations in his motion as being in the nature of ineffective assistance of counsel. So treated, Marks claims in excess of 30 trial and appellate counsel errors. We have reviewed the entirety of Marks’ motion and the record and find no claim merits relief and therefore conclude that the district court did not err when it denied Marks’ motion for postconviction relief without an evidentiary hearing. In the remainder of this opinion, we confine our remarks to several claims by way of illustration.

Marks alleged in his amended motion that he is entitled to postconviction relief because the district court excused a sitting juror and replaced him with an alternate juror when

Marks was not present. In substance, Marks claims that his trial counsel failed to object and to insist that Marks be present for this development.

Although a defendant has a right to be present at all critical stages of a trial, *Rushen v. Spain*, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983), the U.S. Supreme Court has stated that a defendant does not have a right to be present when his or her “presence would be useless,” *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds*, *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). A due process right to be present is not absolute; rather, “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.” 291 U.S. at 107-08. See, also, *State v. Irby*, 170 Wash. 2d 874, 246 P.3d 796 (2011) (cases collected regarding presence of defendant).

In this case, a circumstance developed whereby a juror would have suffered a harm had he continued to serve. The district court assembled counsel and explained the situation. All counsel agreed to excuse the juror prior to deliberations and replace him with an alternate juror who had been duly selected. The alternate was legally capable of serving in the place of the excused juror. See Neb. Rev. Stat. § 29-2004 (Reissue 2008). A just hearing was not thwarted by Marks’ absence, and his presence was not required; therefore, trial counsel was not deficient when he did not insist on Marks’ presence.

Marks also alleged that his trial counsel was unaware prior to trial of evidence regarding a bullet hole in the hood of the vehicle in which Marks was a passenger. It appears that Marks believes that this evidence would establish a self-defense claim and that his trial counsel was ineffective for not objecting to the introduction of this evidence at trial or for not requesting a recess or moving for a continuance or a mistrial based on the introduction of this evidence. The record shows that during trial, witnesses were questioned regarding the bullet hole found in the vehicle, as well as other ballistic evidence. Questioning was done by both the prosecutor and defense counsel. Thus, even if Marks’ trial counsel was not aware of this evidence prior to trial, trial counsel was aware of the

evidence at some point during trial, and Marks was not prejudiced by its introduction. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999) (stating that no violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), exists when material evidence is disclosed prior to end of trial). Indeed, the introduction of this particular evidence arguably was favorable to Marks. The record refutes a claim of prejudice alleged by Marks.

Marks further alleged in his amended motion that his trial counsel was ineffective for failing to investigate various aspects of the case. However, he did not allege any specific facts showing what such an investigation would have revealed, what exculpatory evidence would have been discovered, or how such an investigation would have changed the outcome of the trial. Marks is not entitled to postconviction relief on this allegation.

Marks alleged that his trial counsel was ineffective for failing to call certain individuals as witnesses. In assessing postconviction claims that trial counsel was ineffective for failing to call a particular witness, we have upheld the dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called. See, *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). In his amended motion, Marks did not specifically allege what the testimony of these witnesses would have been if they had been called. Marks' allegations in connection with this claim are conclusory, and he failed to allege sufficient facts which, if proved, would establish a reasonable probability that the outcome of his case would have been different if his trial counsel had called or interviewed the witnesses he mentions. Marks did not satisfy his burden to allege facts amounting to prejudice with respect to this allegation.

Marks also alleged that trial counsel was ineffective when he failed to file a motion to suppress a statement Marks had made to the authorities. The record refutes this allegation, because a *Miranda* rights advisory form was received into

evidence and reflects that Marks voluntarily waived his right to counsel.

Marks also alleged that his trial counsel was ineffective when he failed to request an intoxication defense instruction. The record refutes this allegation, because there was no evidence at trial, including Marks' own testimony, to indicate that Marks was intoxicated on the night of the shooting.

Finally, Marks alleged that his trial counsel was ineffective when he failed to object to proposed jury instructions. This allegation is conclusory; Marks did not specify which jury instructions his trial counsel should have objected to or how such an objection would have resulted in a different outcome of his case. Marks failed to allege facts amounting to prejudice with respect to this allegation.

As explained above, Marks' allegations of ineffective assistance of trial counsel are conclusory, are refuted by the record, and are not pleaded in enough detail to warrant an evidentiary hearing. We therefore conclude that Marks did not allege sufficient facts which, if proved, would establish a reasonable probability that the outcome of his case would have been different but for his trial counsel's alleged deficient performance.

As stated above, Marks' trial counsel was also his appellate counsel, and therefore, we must determine whether Marks was prejudiced by his appellate counsel's alleged failure to raise on appeal issues related to his trial counsel's effectiveness at trial. Based on our conclusion that Marks' trial counsel was not ineffective, we conclude that Marks cannot show prejudice from his appellate counsel's alleged ineffectiveness in failing to raise these issues on direct appeal. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

## CONCLUSION

Marks' motion for postconviction relief does not allege facts which constitute a denial of his constitutional rights, and as to certain allegations, the record refutes his claims. Therefore, the district court did not err when it denied Marks' motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.  
LOUCAS KEYSER, APPELLANT.  
835 N.W.2d 650

Filed June 28, 2013. No. S-12-1006.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. \_\_\_\_: \_\_\_\_\_. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. \_\_\_\_: \_\_\_\_\_. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGL, Judge. Affirmed.

Charles D. Brewster, of Anderson, Klein, Swan & Brewster, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

## INTRODUCTION

Following an evidentiary hearing, Loucas Keyser's motion for postconviction relief was denied. Keyser appeals. We affirm.

## BACKGROUND

In November 2000, Keyser was charged with first degree murder and use of a weapon to commit a felony for the shooting death of Paul Adkism on May 13, 2000. Keyser, Adkism, and two other individuals reportedly drove to a rural area outside of Kearney, Nebraska, where Keyser shot Adkism in the head. Adkism's body was dumped nearby.

On February 20, 2001, a conference was held in chambers with the district court, the prosecutor, and Keyser's counsel present. At this conference, Keyser's counsel was told that the State had information that a vehicle similar to the one occupied by Keyser and Adkism was near the location of the shooting at the time of the shooting and that the owner of the vehicle had a 9-mm handgun which had not been ruled out as the type of weapon that might have caused Adkism's death. This information had been learned from the owner of the other vehicle.

On March 5, 2001, Keyser pled no contest to a reduced charge of second degree murder, pursuant to a plea agreement. The charge of use of a weapon to commit a felony was dismissed. The agreement also provided that theft charges filed in Phelps County, Nebraska, would be dismissed, all in exchange for Keyser's no contest plea. Keyser was sentenced to imprisonment for a term of 60 years to life.

On May 5, 2009, Keyser filed a pro se motion for postconviction relief. In that motion, Keyser alleged, as relevant to this appeal, that his counsel was deficient for not informing him about the potentially exculpatory information disclosed at the February 20, 2001, in-chambers conference and that he was prejudiced by this deficiency because he would not have accepted the plea agreement had he been privy to that information. Keyser was appointed counsel and granted an evidentiary hearing.

Prior to the hearing, the State filed a motion to "bifurcate." At a hearing on that motion on March 1, 2012, the State explained that it had evidence that would show that the evidence at issue from the February 20, 2001, conference was not, in fact, exculpatory. As such, the State argued, that evidence would show that Keyser was not prejudiced by any deficient performance on behalf of counsel. For this reason, the State requested that it be allowed to proceed first on the issue of prejudice at the "bifurcated" evidentiary hearing. Only prejudice was to be addressed at this hearing.

Keyser, through his postconviction counsel, objected to the bifurcation. During that hearing, Keyser's counsel noted that

it was Keyser's burden to show that counsel's performance was deficient and that Keyser was prejudiced by that deficiency. The district court granted the motion to "bifurcate" over Keyser's objection.

The evidentiary hearing was held on August 28, 2012. As was discussed at the March 1 hearing, the State presented evidence first. That evidence consisted of three witnesses who testified generally that law enforcement received a report that a vehicle similar to the one occupied by Keyser and Adkism was seen at the time of and near the location of the murder and that a 9-mm handgun was reportedly inside the vehicle at that time. The State's evidence showed that law enforcement officers were never able to find the handgun in question, but were able to track its purchase and found that it was a "Star 9 millimeter." It was determined that a Star 9-mm handgun was not on a list of possible 9-mm weapons that could have killed Adkism. According to the record, ballistics tests on the bullet that killed Adkism were completed by the time Keyser entered his plea, but this particular weapon had not been traced as of that date.

The three witnesses that testified for the State were all subject to cross-examination. Apparently, the witnesses remained in the courtroom following their respective testimonies, because at the conclusion of the third witness' testimony, the district court asked the first witness a question. The witness answered the question. The district court then invited Keyser's counsel to proceed; counsel replied that he "wasn't going to offer any evidence, but with the Court's inquiry, if I could recall [the first witness]." The witness was then recalled and questioned regarding an individual who, during the investigation, indicated that he had witnessed Keyser kill Adkism. The witness was subject to cross-examination and then excused. After the witness was excused, the district court again inquired whether Keyser's counsel had "[a]ny other evidence?" Counsel indicated he did not, and shortly thereafter, the hearing was adjourned, with the district court taking the matter under advisement.

Among the exhibits offered at this hearing was exhibit 2, which contained all of the law enforcement reports and

records from the initial investigation of Adkism's murder except for the information relating to the evidence disclosed at the February 20, 2001, hearing. Exhibit 2 was offered and received for the limited purpose of showing Keyser's knowledge of the evidence against him at the time he entered his no contest plea.

On October 3, 2012, the district court issued a four-page journal entry denying Keyser's postconviction motion and concluding that even if trial counsel's performance had been deficient, Keyser "suffered no prejudice in that he would still have accepted the plea agreement." Keyser appeals.

### ASSIGNMENTS OF ERROR

On appeal, Keyser assigns, restated and consolidated, that the district court erred in (1) denying his motion for postconviction relief, (2) granting the State's "Motion to Bifurcate" the evidentiary hearing, (3) failing to provide Keyser "an opportunity to present evidence of his side of the case in support of his verified motion," and (4) considering exhibit 2 as testimony rather than for the limited purpose for which it was offered.

### STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.<sup>1</sup>

[2-4] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.<sup>2</sup> When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.<sup>3</sup> With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,<sup>4</sup> an appellate court

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<sup>1</sup> *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012).

<sup>2</sup> *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

<sup>3</sup> *Id.*

<sup>4</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

reviews such legal determinations independently of the lower court's decision.<sup>5</sup>

### ANALYSIS

On appeal, Keyser argues that the district court erred in (1) “bifurcating” the evidentiary hearing which led to the failure of the district court to provide Keyser “an opportunity to present evidence of his side of the case in support of his verified motion,” (2) finding that Keyser was not prejudiced by his trial counsel's failure to disclose to Keyser exculpatory evidence relevant to Keyser's plea, and (3) receiving exhibit 2 into evidence.

#### *“Bifurcation” of Hearing.*

Keyser first contends that the district court erred in “bifurcating” the evidentiary hearing. He argues that the “bifurcation” was inappropriate for two primary reasons: (1) that Neb. Rev. Stat. § 25-1107 (Reissue 2008) sets forth the order of trial and provides that the “party who would be defeated if no evidence were given on either side must first produce his evidence” and (2) that he was “entitled to be heard,” but that “[b]y granting the State's motion to bifurcate in this matter and then allowing the State to go forward with its' [sic] evidence first in the evidentiary proceedings, and then making a ruling that [Keyser's] claim for post conviction should be denied, the District Court did not allow [Keyser] this right.”<sup>6</sup>

Keyser's argument regarding § 25-1107 is unpersuasive. While § 25-1107 does set forth the order of trial, it also expressly provides that the trial court “for special reasons [can] otherwise direct[]” a change in that order. We find that in this case, the district court concluded “otherwise,” essentially finding “special reasons” why the State should go first. The court explained the reasons why the State should be allowed to proceed first and present evidence regarding the nature of the potentially “exculpatory” evidence from the February 20, 2001, hearing and how Keyser was not prejudiced by any deficiency of the trial court.

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<sup>5</sup> *State v. Poe*, *supra* note 2.

<sup>6</sup> Brief for appellant at 9.

Keyser also contends that the district court denied him due process and his right to be heard when it “bifurcated” the hearing. But a review of the record shows that Keyser was never denied the right to be heard. Not only was Keyser allowed to, and in fact did, cross-examine the State’s witnesses, Keyser was permitted to recall one of the State’s witnesses. In addition, and tellingly, the district court also inquired of Keyser’s counsel regarding the presentation of evidence. On one occasion just prior to recalling one of the State’s witnesses, Keyser’s counsel indicated that he had not planned to present evidence; after that witness was excused, Keyser’s counsel responded negatively when the district court asked if he had any other evidence.

A review of the record shows that Keyser was aware that the burden in a postconviction action was his, despite the change in order of the proceedings; yet, he still failed to present any evidence to support his claim. Keyser made no offer of proof at the hearing and did not request leave to make such an offer after the hearing adjourned. Following the adjournment of the hearing, Keyser filed no motion to alter or amend, or for a new trial. It appears from the record that Keyser’s deposition was never taken, yet Keyser fails to argue on appeal that the district court erred in not allowing him to take that deposition.

The district court’s decision to grant the State’s motion to “bifurcate” the evidentiary hearing was unusual. We take this opportunity to discourage district courts from adopting such a procedure. But we cannot conclude that in this case, the district court erred in doing so. Keyser’s argument that the “bifurcation” was in error is without merit.

### *Finding of Prejudice.*

Keyser next argues the district court erred in finding that he was not prejudiced by his trial counsel’s failure to disclose the potentially exculpatory evidence prior to his plea. Keyser contends that his plea could not have been entered knowingly when he was not “adequately informed of *all* of the facts and circumstances known by his defense counsel.”<sup>7</sup>

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<sup>7</sup> *Id.* at 11.

While the district court's conclusion that Keyser was not prejudiced is subject to a *de novo* review, the underlying factual question—whether on these facts Keyser would have rejected the plea offer had he known of the potentially exculpatory evidence—is reviewed for clear error. And at the time of the plea, the State had testimony from an eyewitness who was going to testify that Keyser shot Adkism, as well as testimony from other witnesses who were going to testify that Keyser admitted to the witnesses that he had shot Adkism. The plea agreement reduced the first degree murder charge to a second degree murder charge and dismissed three other felony charges pending against Keyser. There was no other exculpatory evidence in Keyser's favor. We find no error in the district court's factual finding that even in light of the potentially exculpatory evidence, Keyser would have still accepted the plea agreement, and we further conclude upon our *de novo* review that this finding supports the conclusion that Keyser was not prejudiced by any deficiency in counsel's performance. Keyser's argument regarding prejudice is without merit.

*Exhibit 2.*

Finally, Keyser assigns that the district court erred in improperly utilizing exhibit 2. Exhibit 2 was the complete record of investigative reports relating to the Adkism murder, minus the reports dealing with the potentially exculpatory evidence disclosed at the February 20, 2001, hearing. Exhibit 2 was admitted for the limited purpose of showing what trial counsel was aware of, and therefore what Keyser was aware of, at the time he entered his no contest plea. Keyser argues the district court concluded that there was sufficient evidence from exhibit 2 to convict Keyser and that thus, he would have pled guilty even if he had known about the potentially exculpatory evidence.

Our review of the district court's order does not support Keyser's contention that the district court was assessing whether Keyser would have been convicted had he gone to trial. Rather, we read the district court's order as simply noting the evidence gathered against Keyser during the investigation

and concluding that based upon the results of that investigation—information which Keyser was aware of at the time of his plea—Keyser would not have rejected the plea agreement offered to him. Keyser’s final assignment of error is without merit.

### CONCLUSION

The order of the district court denying Keyser’s motion for postconviction relief is affirmed.

AFFIRMED.

CONNOLLY and McCORMACK, JJ., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, v.  
DE’ARIS R. TRICE, APPELLANT.  
835 N.W.2d 667

Filed July 5, 2013. No. S-12-126.

1. **Appeal and Error.** An appellate court may, at its option, notice plain error.
2. **Trial: Appeal and Error.** In determining plain error, where the law at the time of trial was settled and clearly contrary to the law at the time of appeal, it is enough that an error be “plain” at the time of appellate consideration.
3. **Criminal Law: Time: Appeal and Error.** A new criminal rule—one that constitutes a clear break with the past—applies retroactively to all cases pending on direct review or not yet final, and not just to the defendant in the case announcing the new rule.
4. **Homicide: Words and Phrases.** A “sudden quarrel” is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
5. **Homicide: Intent.** In determining whether a killing constitutes murder or sudden quarrel manslaughter, the question is whether there existed reasonable and adequate provocation to excite one’s passion and obscure and disturb one’s power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.
6. **Criminal Law: Words and Phrases.** Generally speaking, a fight between the victim and a third party is not a “sudden quarrel” as to the defendant.
7. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of the litigant and is of such a nature that to leave it

uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

8. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial if the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Reversed and remanded for a new trial.

Patrick P. Carney and Ryan J. Stover, of Carney Law, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ., and MOORE, Judge.

CONNOLLY, J.

A jury convicted De'Ariss R. Trice of second degree murder. Before submitting the case to the jury, the district court gave the jury a step instruction regarding second degree murder and manslaughter. Although the instruction was correct when it was given,<sup>1</sup> our subsequent holding in *State v. Smith*<sup>2</sup> rendered the instruction an incorrect statement of the law. Because *Smith* applies retroactively to this case, and because there is evidence—though slight—upon which a jury could conclude that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter, we find plain error. We reverse.

## BACKGROUND

### THE MORNING OF THE STABBING

At about 1:40 a.m. on December 26, 2010, police officers responded to a call at a house in Norfolk, Nebraska. A police

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<sup>1</sup> See *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), overruled, *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), and *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

<sup>2</sup> *Smith*, *supra* note 1.

dispatcher initially reported a possible stabbing, and later upgraded it to an actual stabbing and possible gun involvement. Officers arrived within a few minutes of the call.

The scene was chaotic. There had been an after-hours party at the house. The house was relatively small, there were many people and cars in the street, and people were trying to leave the area. One individual told an officer that a person had been stabbed, but she did not know who did it. That officer jogged up to the house, looking for anybody with a knife or gun, to try and secure the scene. But the officer saw a group of people around a man, later identified as Timothy Warren, lying on the ground, and the officer stopped to render aid. A woman was already trying to help Warren. The officer opened Warren's airway, confirmed that he was still breathing, and took a look at the wound; it was about a 2-inch puncture wound on the right side of his abdomen. The officer radioed for emergency medical assistance.

Other officers arrived. One officer left to get a CPR mask, while the officer who initially stopped to help Warren left to secure the scene. The officer left Warren with the woman who had initially cared for him; she had told the officer that she had training in CPR and was a nursing and medical assistant. So the officer, with another officer, approached the house. From outside the front door, the officers saw an "extremely agitated" male, with "clenched fists, shaking his arms, [who] had blood on him," and a woman standing in front of him trying to hold him back. The officers entered the house, with one officer "bear hug[ging]" the man, later identified as Rickey Jordan, and attempting to calm him down. Jordan was yelling at two individuals in the house, later identified as Trice and his brother.

The other officer began talking to Trice and his brother. The officer told them to stop and stay where they were; Trice immediately stopped what he was doing, but his brother became angry. Trice attempted to calm his brother down, and the officer asked Trice's brother whether he had stabbed someone. Trice's brother responded incompletely, muttering "something to the effect of 'with a knife.'" The officer later described the statement, not as an admission, but as "something that he

— like he didn't complete his thought when he said it." At that point, Trice's brother calmed down.

The officer then left to help with Jordan, who was still struggling. The officers placed Jordan in handcuffs. Other people at the party told the officers that they had the "wrong guy," and they released Jordan later that morning. Meanwhile, Trice and his brother had left the party. The paramedics had also arrived and transported Warren to the hospital. There, doctors discovered that the stab wound had caused significant internal damage and that Warren was bleeding heavily into his abdomen. The doctors performed surgery to try and repair the damage, but they were unsuccessful, and Warren died.

#### THE INVESTIGATION, TRIAL, AND SENTENCING

The police secured and processed the crime scene that same morning and collected and preserved possible evidence of the crime, including photographs, swabs of blood, and several knives. Each of the knives was a regular kitchen knife with one exception—there was also a decorative knife, later identified as belonging to Trice. During the investigation, the police sent several items to the Nebraska State Patrol crime laboratory to be tested for DNA and to determine if the DNA matched any individuals at the party. Notably, the police sent in Trice's knife, the alleged murder weapon, to be tested for Warren's DNA, but the results were inconclusive. Police also interviewed many people at the party. Eventually, the investigation focused on Trice as a suspect. By that time, he had returned to his hometown of Chicago, Illinois. When he found out that the police were looking for him, he voluntarily turned himself in and returned to Nebraska.

At trial, much of the testimony came from people at the party. That testimony revealed that the people living at the house had been at a club which closed at 1 a.m. After the club closed, they invited people to their house for an after-hours party, and, although the invitation list was initially small, a "few people turned into a lot."

Stories of exactly what happened at the party varied from witness to witness. The record indicates that at some point, Warren got into a verbal altercation in the living room with

Kevin Bardwell. Warren threw a punch at Bardwell, starting a fight between them, and other people got involved. During that fight, someone stabbed Warren. The majority of the people at the party testified that they did not see who stabbed Warren. Several witnesses testified that Trice was at the party and in the living room, but the testimony about what Trice did and where he was during the fight differed. Jordan and another witness, however, testified that they saw Trice stab Warren during the fight.

Testimony also revealed that after Warren had been stabbed, Jordan became enraged. At some point, Trice allegedly cut Jordan on the arm. Jordan grabbed some knives from the kitchen and went after Trice, who locked himself in the bathroom. Jordan was yelling that Trice had stabbed his friend and that he was going to kill Trice. About that time, the police arrived and detained Jordan. Trice and his brother then left the party with his brother's girlfriend and her mother. Testimony indicated that on the ride home, Trice's brother repeatedly asked him if he had done "it" or "this." Trice's brother testified that eventually Trice said, "Yeah, I — I had to, I had to protect you and me." His brother's girlfriend testified that Trice said that "he cut somebody, but he didn't kill nobody," and her mother testified that Trice said, "Yeah, I stabbed him in the leg, but I did not kill him."

The court instructed the jury. Notably, the court gave a then-correct step instruction regarding second degree murder and manslaughter. The instruction told the jury that it should find Trice guilty of second degree murder if the State proved beyond a reasonable doubt that he had intentionally, but without premeditation, killed Warren. The instruction then stated that only if the State failed to prove those elements could the jury then consider whether Trice had committed manslaughter (here, based on a sudden quarrel). The jury found Trice guilty of second degree murder. The court sentenced Trice to a term of 40 years to life in prison.

#### ASSIGNMENTS OF ERROR

As will be discussed more fully below, we find plain error. As such, we do not recite Trice's assigned errors, which are

numerous. Nor do we find those alleged errors necessarily likely to recur on remand,<sup>3</sup> so there is no need to discuss them.

### STANDARD OF REVIEW

[1,2] An appellate court may, at its option, notice plain error.<sup>4</sup> In determining plain error, where the law at the time of trial was settled and clearly contrary to the law at the time of appeal, it is enough that an error be “plain” at the time of appellate consideration.<sup>5</sup>

### ANALYSIS

#### STEP INSTRUCTION REGARDING SECOND DEGREE MURDER AND MANSLAUGHTER

Our decision is guided by *Smith*<sup>6</sup> and our case law applying it. In *Smith*, the district court instructed the jury to convict the defendant if the State proved beyond a reasonable doubt that the defendant had killed intentionally, but without premeditation. The court further instructed the jury that only if the State failed to prove one of those elements could the jury go on to consider whether the defendant had committed manslaughter.<sup>7</sup>

At the time, that instruction was correct because in *State v. Jones*,<sup>8</sup> we had held that an intentional killing could never be sudden quarrel manslaughter. But in *Smith*, we overruled *Jones* and held that “an intentional killing committed without malice upon a ‘sudden quarrel,’ . . . constitutes the offense of manslaughter.”<sup>9</sup> Because of that holding, the jury instruction in *Smith* was no longer a correct statement of the law:

[T]he step instruction required the jury to convict on second degree murder if it found that [the defendant] killed

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<sup>3</sup> See, e.g., *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013).

<sup>4</sup> See, e.g., *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

<sup>5</sup> See, e.g., *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

<sup>6</sup> See *Smith*, *supra* note 1.

<sup>7</sup> See *id.*

<sup>8</sup> See *Jones*, *supra* note 1.

<sup>9</sup> *Smith*, *supra* note 1, 282 Neb. at 734, 806 N.W.2d at 394.

[the victim] intentionally, but it did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.<sup>10</sup>

Although the instruction was error, we found no resulting prejudice. We reasoned that the defendant “was prejudiced by the erroneous jury instruction only if the jury could reasonably have concluded on the evidence presented that his intent to kill was the result of a sudden quarrel.”<sup>11</sup> We found insufficient evidence in the record to support that conclusion and concluded the error was harmless.<sup>12</sup>

[3] Here, the jury instruction is, in all material respects, identical to the erroneous jury instruction in *Smith*. Although we decided *Smith* several weeks after the trial and verdict in this case, the new rule in *Smith* still applies here.<sup>13</sup> A new criminal rule—one that constitutes a clear break with the past<sup>14</sup>—applies retroactively to all cases pending on direct review or not yet final, and not just to the defendant in the case announcing the new rule.<sup>15</sup> Concluding otherwise would violate the principle of treating similarly situated defendants the same and would compromise the ideal of evenhanded administration of justice.<sup>16</sup> Because Trice’s case was not yet final when *Smith* came out and because the *Smith* rule was clearly a new rule, it applies in this case. So the step instruction given here was error. The question is whether that error prejudiced Trice. The answer depends on whether “the jury could reasonably have concluded on the evidence presented that his intent to kill was the result of a sudden quarrel.”<sup>17</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 735, 806 N.W.2d at 395.

<sup>12</sup> See *Smith*, *supra* note 1.

<sup>13</sup> See, e.g., *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013); *Smith*, *supra* note 5.

<sup>14</sup> See *Smith*, *supra* note 5.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *Smith*, *supra* note 1, 282 Neb. at 735, 806 N.W.2d at 395.

[4,5] A “sudden quarrel” is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.<sup>18</sup> It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.<sup>19</sup> The question is whether there existed reasonable and adequate provocation to excite one’s passion and obscure and disturb one’s power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.<sup>20</sup>

We note that in defining a “sudden quarrel,” in *Smith*, we also stated, “It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason *so that the elements necessary to constitute murder are absent.*”<sup>21</sup> This statement was imprecise. Although provocation negates malice,<sup>22</sup> malice is not a statutory element of second degree murder in Nebraska.<sup>23</sup> The above italicized language should not be included in future jury instructions; while such an inclusion is not necessarily prejudicial error, it is error nonetheless and should be avoided.

Here, the record presents an unclear, confusing picture as to exactly what happened at the party. Witnesses’ accounts of what happened varied from person to person, including details of the fight; who it involved; and, notably, the actions and whereabouts of Trice during the fight. Although the witnesses’ stories differ, there is at least some evidence indicating that Trice might have acted upon a sudden quarrel.

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<sup>18</sup> *Smith*, *supra* note 5.

<sup>19</sup> *Id.*

<sup>20</sup> See *id.*

<sup>21</sup> *Smith*, *supra* note 1, 282 Neb. at 726, 806 N.W.2d at 389 (emphasis supplied).

<sup>22</sup> See *id.*

<sup>23</sup> See *Burlison*, *supra* note 1.

[6] Although the fight existed mainly between Warren and Bardwell, and generally speaking, a fight between the victim and a third party is not a “sudden quarrel” as to the defendant,<sup>24</sup> various witnesses indicated that the fight involved more than just those two individuals. For example, when asked whether there was “more than one person in there fighting with [Warren],” one witness replied, “Yes . . . I seen about five in the living room at this time.” Another witness testified that Warren and Bardwell “[got] to fighting. They [got] to fighting. Everybody pushing everybody, grabbing everybody.” Other witnesses testified that they were involved in the fight only to break it up, though whether they actually were trying to break it up was not clear from the record. Additionally, several people were injured during the fight. For example, one witness testified that her friend got hit in the nose and was bleeding. In short, the record shows that a brawl broke out.

Trice’s involvement in that brawl is less than clear. Various witnesses placed him at different places in the room, with different levels of involvement. Some said that he was off to the side, along the wall, and was not involved in the fight. But Trice’s brother, a witness for the State, testified that he and Trice were trying to stop the fight and that his “little brother [Trice] jumped in the middle.” Trice’s brother also testified that once Trice was involved in the fight, Warren swung a bottle “over [his] little brother’s shoulder,” though it’s unclear whether this was directed at Bardwell or Trice. Trice’s brother also testified that he initially stayed at this party because he “didn’t feel that [Trice] was safe,” because of some “earlier events” that had happened days before the party. Finally, Trice’s brother testified that when he and Trice left, he asked Trice whether he had done “‘it,’” to which Trice eventually responded, “‘Yeah, I — I had to, I had to protect you and me.’”

We believe, all things considered, that a jury could find that Trice acted upon a sudden quarrel. Certainly, the evidence does

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<sup>24</sup> See, e.g., *Watt*, *supra* note 13; *State v. Harris*, 27 Kan. App. 2d 41, 998 P.2d 524 (2000); *State v. Ruscingno*, 217 N.J. Super. 467, 526 A.2d 251 (1987). Cf. *State v. Brown*, 285 Kan. 261, 173 P.3d 612 (2007).

not compel this conclusion; as we have stated, the evidence in this regard is slight. But such a conclusion is at least reasonably inferable. Even the State, at oral argument, seemingly agreed that a manslaughter instruction was “probably properly given,” though the State emphasized that the jury, in the State’s view, rationally rejected the sudden quarrel premise. The problem, of course, is that under the instructions given (and presumably followed<sup>25</sup>), the jury never actually considered whether Trice acted upon a sudden quarrel.

[7] We therefore find plain error. Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of the litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.<sup>26</sup> Here, the jury instruction did not properly instruct the jury regarding the interplay between second degree murder and manslaughter. And because there was evidence—though slight—upon which a jury could have convicted Trice for sudden quarrel manslaughter, that error was prejudicial. We reverse.

#### DOUBLE JEOPARDY

[8] Having found reversible error, we must determine whether the totality of the evidence was sufficient to sustain Trice’s conviction. If it was not, then double jeopardy forbids a remand for a new trial.<sup>27</sup> But the Double Jeopardy Clause does not forbid a retrial if the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.<sup>28</sup>

After reviewing the record, we conclude that the evidence at trial was sufficient to support the verdict against Trice. There were two witnesses who testified to seeing him stab Warren, and there were also witnesses who testified that Trice admitted

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<sup>25</sup> See, e.g., *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

<sup>26</sup> *Smith*, *supra* note 5.

<sup>27</sup> See, e.g., *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012).

<sup>28</sup> See, e.g., *id.*

to stabbing him. We therefore conclude that double jeopardy does not preclude a remand for a new trial and that the State may retry Trice on the second degree murder and manslaughter charges.

### CONCLUSION

We find plain error in the step instruction regarding second degree murder and manslaughter.

REVERSED AND REMANDED FOR A NEW TRIAL.  
HEAVICAN, C.J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.  
KIMBERLY D. WIEDEMAN, APPELLANT.  
835 N.W.2d 698

Filed July 12, 2013. No. S-11-888.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
4. **Constitutional Law: Due Process.** The Due Process Clause of the 14th Amendment contains a substantive component that provides at least some protection to a person's right of privacy.
5. \_\_\_\_: \_\_\_\_\_. The substantive component of the 14th Amendment protects (1) the individual interest in avoiding disclosure of personal matters and (2) the interest of independence in making certain kinds of important decisions.
6. **Controlled Substances: Health Care Providers: Statutes.** The State has broad police powers in regulating the administration of drugs by the health professions.

7. **Constitutional Law: Controlled Substances: Records.** Patients' substantive 14th Amendment privacy interests in prescription records are limited to the right not to have the information disclosed to the general public.
8. **Constitutional Law: Controlled Substances: Public Health and Welfare: Records.** A legitimate request for prescription information or records by a public official responsible for safeguarding public health and safety, subject to safeguards against further dissemination of those records, does not impermissibly invade any 14th Amendment right to privacy.
9. **Constitutional Law: Search and Seizure: Words and Phrases.** A "search" under the Fourth Amendment occurs whenever an expectation of privacy that society is prepared to consider reasonable is infringed.
10. \_\_\_\_: \_\_\_\_: \_\_\_\_: A reasonable expectation of privacy is an expectation that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.
11. **Constitutional Law: Search and Seizure.** The "persons, houses, papers, and effects" listed in the Fourth Amendment as protected objects remain central to understanding the scope of what the amendment protects.
12. **Controlled Substances: Health Care Providers: Statutes.** A reasonable patient buying narcotic prescription drugs knows or should know that the State, which outlaws the distribution and use of such drugs without a prescription, will keep careful watch over the flow of such drugs from pharmacies to patients.
13. **Constitutional Law.** There is no reasonable expectation of privacy in personal information a defendant knowingly exposes to third parties.
14. **Controlled Substances: Health Care Providers.** An investigatory inquiry into prescription records in the possession of a pharmacy is not a search pertaining to the pharmacy patient.
15. **Controlled Substances: Records.** A patient who has given his or her prescription to a pharmacy in order to fill it has no legitimate expectation that governmental inquiries will not occur.
16. **Criminal Law: Records.** Issuance of a subpoena to a third party to obtain records does not violate the rights of a defendant about whom the records pertain, even if a criminal prosecution is contemplated at the time the subpoena is issued.
17. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Affirmed.

Bell Island, of Island & Huff, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

## I. NATURE OF CASE

Kimberly D. Wiedeman was charged and convicted of 10 counts of acquiring a controlled substance by fraud. The controlled substances were obtained pursuant to prescriptions written for chronic pain issues, but Wiedeman did not inform her medical providers that she was being prescribed similar medications elsewhere. Wiedeman argues that the fraudulent act was the singular failure to disclose to the other medical providers and that she should not be charged with multiple counts based on multiple prescriptions from the same doctor. Wiedeman also argues that her medical and prescription records were obtained in violation of her constitutional rights.

## II. BACKGROUND

Wiedeman was charged with 10 counts of acquiring a controlled substance by fraud, in violation of Neb. Rev. Stat. § 28-418 (Reissue 2008), a Class IV felony. Wiedeman was charged with violating § 28-418 on or about April 1, 2010 (count I), April 14 (count II), May 3 (count III), May 24 (count IV), June 1 (count V), June 13 (count VI), June 21 (count VII), July 19 (count VIII), August 9 (count IX), and August 23 (count X).

### 1. PRETRIAL MOTIONS

Before trial, defense counsel made a plea in abatement, arguing that it was improper for the State to charge Wiedeman with 10 different counts of acquiring a controlled substance by fraud when there were merely 10 times Wiedeman filled prescriptions obtained through a single act of alleged deceit. The court overruled the motion.

Defense counsel next filed a motion to suppress Wiedeman's prescription records, because "[t]he search of [Wiedeman's] records was done without a warrant and was in violation

of [Wiedeman's] rights under the Fourth and Fourteenth Amendments to the United States Constitution; Sects. 1, 3, and 7 of the Bill of Rights to the Nebraska Constitution." The Scotts Bluff County Attorney had obtained Wiedeman's pharmacy records after issuing subpoenas to the various pharmacies in Scotts Bluff County pursuant to Neb. Rev. Stat. § 86-2,112 (Reissue 2008).

At the hearing on the motion to suppress, the prosecution offered exhibit 2, which was a copy of its subpoena to the pharmacy at Walgreens. No other subpoena was offered into evidence. Defense counsel admitted during the hearing that the prosecution had provided him with copies of three or four other subpoenas for three or four other pharmacies, and the investigator testified that all the subpoenas were identical. Nevertheless, defense counsel argued that the prescription records should be suppressed not only because any search is presumptively unreasonable without a warrant, but also because there was only one subpoena in evidence.

Defense counsel also moved to suppress the medical records and all physical evidence seized during a search of Wiedeman, her home, and her vehicle, arguing that the warrants for those searches were invalid.

The trial court denied the motion to suppress. The court explained that § 86-2,112 and Neb. Rev. Stat. § 28-414 (Cum. Supp. 2010) provided for the investigation of prescription records without a warrant. The court found that the warrants for medical records and other items seized were supported with probable cause and that the places to be searched and things to be seized were described with particularity. The case went to trial.

## 2. TRIAL

At trial, the evidence against Wiedeman consisted primarily of the prescription records and the testimony and records of her medical providers.

### (a) Medical Providers

Wiedeman suffered from chronic pain associated with rheumatoid arthritis and spinal fusions performed in 2004 and

2009. In August 2009, Wiedeman saw neurologist Dr. Betty Ball for her neck issues. Wiedeman continued to see Ball until August 2010.

Separately, beginning sometime in 2009 and continuing until July 2010, Wiedeman was a patient of nurse practitioner Cheryl Laux at the Chimney Rock Medical Center in Bayard, Nebraska (Chimney Rock). On January 12, 2009, Wiedeman signed a pain contract with Chimney Rock, apparently in conjunction with pain management issues resulting from her 2009 spinal fusion surgery. In the contract, Wiedeman agreed to receive opioid medication only from Chimney Rock and not from any other source. Wiedeman further agreed to fill her prescriptions for opioid medications at only one pharmacy of her choosing, not at multiple pharmacies. Laux testified that she did not know Wiedeman had any other medical providers.

During this period, Wiedeman also went to Quick Care Medical Services from time to time. There, she saw nurse practitioner Jodene Burkhart and also, as can be surmised from the record, a “Dr. Harkins.” In December 2009, Burkhart ran blood tests that indicated Wiedeman had rheumatoid arthritis. Burkhart prescribed hydrocodone and recommended Wiedeman see a rheumatologist. The nearest rheumatologists are located in Colorado. Many of those were not accepting new patients, and the evidence was that Wiedeman has still not been able to see one.

Dr. Michelle Cheloha became Wiedeman’s treating family practice physician in April 2010. Cheloha explained that Wiedeman needed to see a rheumatologist for a more definitive diagnosis and better treatment of her arthritis, but Cheloha tried to address the issues relating to Wiedeman’s condition until a rheumatologist could do so. Cheloha was aware of urgent care visits to the clinic where Cheloha worked and explained that it looked like Wiedeman needed to establish routine medical care.

Cheloha was also aware of Wiedeman’s past treatment with Ball and of the arthritis test results. It does not appear, however, that Cheloha knew Wiedeman was still regularly seeing Ball when Cheloha accepted Wiedeman as a patient.

Nor, apparently, was Cheloha aware of Wiedeman's treatment by Laux at Chimney Rock, or of the visits to Quick Care Medical Services. Cheloha admitted she did not specifically ask Wiedeman if she was seeing other physicians. But Cheloha did specifically recall discussing with Wiedeman what medications she had previously tried. Cheloha mistakenly concluded from that conversation, and from reviewing her records, that Wiedeman had last been prescribed a narcotic in 2008.

Wiedeman told Cheloha that she had been taking tremendous amounts of over-the-counter ibuprofen for her pain. Wiedeman also told Cheloha that she had "tried" her mother's narcotic medications relating to rheumatoid arthritis. Wiedeman did not disclose any other past or present prescriptions relating to her chronic pain issues.

Wiedeman saw Cheloha monthly. Cheloha began prescribing hydrocodone. She stated that the maximum dosage was 6 pills per day, or 180 pills per month. Cheloha started with a plan of 90 pills per month. By May 3, 2010, Cheloha increased the prescription to the maximum dosage of 180 pills per month. Cheloha eventually switched Wiedeman to oxycodone when the maximum dosage of hydrocodone was still failing to address Wiedeman's pain issues. Cheloha told Wiedeman not to mix hydrocodone with oxycodone. The maximum monthly dosage of oxycodone is also 180 pills.

On April 14, 2010, Cheloha represcribed 90 pills of hydrocodone after Wiedeman told Cheloha that her husband had accidentally taken her pills out of town. On June 1, Wiedeman told Cheloha that she had an allergic reaction to the oxycodone and that she had flushed the pills down the toilet. Cheloha rewrote a prescription for 180 hydrocodone pills, with one permitted refill. This was the only prescription written by Cheloha that allowed a refill, and the record is unclear whether this was intentional.

#### (b) Prescription Records

The State entered into evidence Wiedeman's prescription records from five different pharmacies for the period of August 1, 2009, to August 27, 2010. The prescription records reflect

that in August 2009, Ball prescribed 30 pills of oxycodone and the prescription was filled at the Community Pharmacy at Regional West Medical Center. No other prescriptions for controlled substances were filled in August.

In September 2009, Wiedeman was prescribed a total of 120 hydrocodone pills and 100 oxycodone pills. Ball prescribed 60 oxycodone pills, filled at the Community Pharmacy. Harkins at Quick Care Medical Services prescribed a total of 40 oxycodone and 120 hydrocodone pills on several different occasions, and those were filled at the pharmacy at Kmart.

In October 2009, Wiedeman filled prescriptions for a total of 40 oxycodone pills and 200 hydrocodone pills. She filled one 30-pill hydrocodone prescription from Ball at Community Pharmacy, a 60-pill hydrocodone prescription from Harkins at Kmart, a 40-pill oxycodone prescription from Harkins at Walgreens, and three different hydrocodone prescriptions from Burkhart at the Co-op Plaza Pharmacy, totaling 110 pills.

In November 2009, Wiedeman filled prescriptions totaling 60 oxycodone pills and 75 hydrocodone pills. One prescription was for 60 oxycodone pills from Ball through Community Pharmacy. One was for 40 hydrocodone pills from Harkins, filled at Kmart. Two smaller hydrocodone prescriptions were written by “Ernst, C.” and “Keralis, M.” respectively, and were filled at Walgreens.

In December 2009, Wiedeman obtained 120 oxycodone pills and 40 hydrocodone pills. She filled her regular 60-pill oxycodone prescription from Ball at Community Pharmacy. She filled a 60-pill oxycodone prescription from Laux at the Co-op Plaza Pharmacy and a 40-pill hydrocodone prescription from Burkhart at Kmart.

In January 2010, Wiedeman filled prescriptions totaling 60 oxycodone pills and 220 hydrocodone pills. The oxycodone prescription was from Ball, the hydrocodone prescriptions were all from Burkhart. Wiedeman filled prescriptions from Burkhart for 40 hydrocodone pills on January 2, 90 pills on January 16, and 90 pills on January 29.

In February 2010, Wiedeman received 40 oxycodone pills and 150 hydrocodone pills. February was the only month Ball

wrote prescriptions for both oxycodone and hydrocodone, for 40 and 30 pills respectively, filled at Community Pharmacy. Burkhart wrote a 90-pill prescription for hydrocodone, filled at Kmart. An "Agarwal, V.," prescribed 30 hydrocodone pills, filled at Walgreens.

In March 2010, Wiedeman received 80 oxycodone pills and 120 hydrocodone pills. Ball prescribed her regular dosage of 60 oxycodone pills, filled at Community Pharmacy, while Burkhart prescribed a total of 120 hydrocodone pills, filled at Kmart. A "Hadden/Keena" prescribed 20 oxycodone pills, filled at the Co-op Plaza Pharmacy.

In April 2010, Wiedeman filled prescriptions totaling 60 oxycodone pills and 320 hydrocodone pills. On April 1 (count I), Wiedeman filled a prescription for 90 hydrocodone pills from Cheloha at Wal-Mart. On April 5, she filled a prescription from Burkhart for 30 hydrocodone pills at Kmart. On April 7, she filled a 60-pill oxycodone prescription from a "Zimmerman" at Community Pharmacy. On April 14 (count II), Wiedeman filled another prescription from Cheloha for 90 hydrocodone pills at Wal-Mart. Wiedeman filled two prescriptions for hydrocodone from Harkins on April 17 and 19, each for 25 pills, at Kmart. On April 27, Wiedeman filled another hydrocodone prescription from Burkhart for 60 pills, also at Kmart.

In May 2010, Wiedeman filled prescriptions totaling 250 oxycodone pills and 230 hydrocodone pills. On May 3 (count III), at Wal-Mart, she filled a 180-pill hydrocodone prescription from Cheloha. On May 10, at Kmart, Wiedeman filled a prescription from Burkhart for 50 hydrocodone pills. The next day, on May 11, she filled a 30-pill oxycodone prescription from Ball at Community Pharmacy. On May 14, Wiedeman filled an oxycodone prescription from Burkhart for 30 pills at Co-op Plaza Pharmacy. On May 24 (count IV), she filled another prescription from Cheloha for 180 oxycodone pills at Walgreens. Wiedeman filled a small prescription for 10 oxycodone pills at Walgreens, prescribed by "Hill, B.," on May 30.

In June 2010, Wiedeman filled prescriptions totaling 30 oxycodone pills from Ball and 540 hydrocodone pills from

Cheloha. She filled prescriptions from Cheloha for 180 pills each at Wal-Mart on June 1 (count V) and again on June 13 (count VI). The June 13 prescription was presumably the refill of the June 1 prescription. Wiedeman filled a prescription from Cheloha for 180 hydrocodone pills at Kmart on June 21 (count VII). Wiedeman filled her prescription of 30 oxycodone pills from Ball at Community Pharmacy.

In July 2010, Wiedeman obtained 80 oxycodone pills and 240 hydrocodone pills. She filled a prescription from “Voth-Mueller, C.,” for 20 oxycodone at Walgreens on July 5. She filled a 30-pill hydrocodone prescriptions from “Lacey, Trish,” at Co-op Plaza Pharmacy on July 9. Wiedeman filled a prescription for 60 oxycodone pills from Ball at Community Pharmacy on July 6. She filled another 30-pill hydrocodone prescription from “Lacey, Trish,” at Co-op Plaza Pharmacy on July 15. Finally, she filled a prescription on July 19 (count VIII) from Cheloha for 180 hydrocodone pills at Kmart.

In August 2010, Wiedeman obtained 180 oxycodone pills and 120 hydrocodone pills. On August 4, she filled her monthly prescription of 60 oxycodone pills from Ball at Community Pharmacy. On August 9 (count IX), Wiedeman filled her 120-pill oxycodone prescription from Cheloha at Walgreens. On August 23 (count X), she filled her prescription for 120 hydrocodone pills from Cheloha at Kmart.

These prescriptions came to an end when, sometime in August 2010, Wiedeman went to Chimney Rock to see Laux. Nurse practitioner Kevin Harriger saw Wiedeman because Laux was on medical leave. Wiedeman complained of pain associated with her rheumatoid arthritis and past neck surgeries. Harriger prescribed oxycodone, but became suspicious after Wiedeman left the clinic. After confirming with several pharmacies that Wiedeman was filling narcotic prescriptions from multiple doctors and multiple pharmacies, Harriger called the police, who began their investigation of Wiedeman.

#### (c) Wiedeman’s Statements

Investigator James Jackson testified as to a recorded interview with Wiedeman conducted as part of his investigation. Wiedeman admitted in the interview that she took the narcotic

medications for both pain and addiction. Wiedeman said she was taking up to 18 hydrocodone a day, on an “as-needed basis.” In the interview, Wiedeman admitted that she knew that Cheloha would not have written all the prescriptions for her had Wiedeman told Cheloha about the other medical providers she was seeing and her other prescriptions.

At trial, Wiedeman testified that she always took her medications as directed. She said that she never obtained a prescription when she already had one. Wiedeman testified that most of her prescriptions were written for 12 pills a day and “then it went up.” She was sure she never took in more than the largest number prescribed per day, and she did not think she had ever taken more than 15 in one day. Wiedeman testified that she never took hydrocodone and oxycodone on the same day. She explained that she went to different medical providers and filled her prescriptions at different pharmacies simply because she traveled a lot for work.

Defense counsel’s motions for directed verdict were overruled. The jury found Wiedeman guilty of all 10 counts. She appeals.

### III. ASSIGNMENTS OF ERROR

Wiedeman assigns that the trial court erred in (1) failing to direct a verdict when the State failed to prove Wiedeman obtained a prescription by fraud, deception, subterfuge, or misrepresentation; (2) failing to sustain the motion to suppress pharmacy records when they were seized without a warrant; (3) failing to sustain the motion to suppress when the State failed to offer the subpoenas which it used to obtain Wiedeman’s pharmacy records; and (4) finding the affidavit for the warrant set forth sufficient facts establishing probable cause.

### IV. STANDARD OF REVIEW

[1] In reviewing a trial court’s ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court’s findings for clear error. But whether those facts trigger or violate Fourth Amendment

protections is a question of law that we review independently of the trial court's determination.<sup>1</sup>

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.<sup>2</sup> The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>3</sup>

## V. ANALYSIS

### 1. FAILURE TO SUPPRESS PHARMACY RECORDS

We first address Wiedeman's arguments that the manner in which the State obtained her pharmacy records and offered those records into evidence violated her 4th and 14th Amendment rights. Section 28-414(3)(a) provides that prescriptions for all controlled substances listed in Schedule II shall be kept in a separate file by the dispensing practitioner and that the practitioner "shall make all such files readily available to the department and law enforcement for inspection without a search warrant." Without challenging the statute itself, Wiedeman argues that law enforcement violated her rights under the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution by obtaining her prescription records without a warrant. Alternatively, she argues those rights required that the State obtain her records by means of something "in between a subpoena and a warrant" and that it demonstrate at trial the prescription records were obtained "in a proper manner."<sup>4</sup>

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<sup>1</sup> *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

<sup>2</sup> *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

<sup>3</sup> *Id.*

<sup>4</sup> Brief for appellant at 19.

[3] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.<sup>5</sup> The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[4,5] In addition, the Due Process Clause of the 14th Amendment contains a substantive component that provides at least some protection to a person's right of privacy.<sup>6</sup> The U.S. Supreme Court has said that this privacy entails at least two kinds of interests: (1) the individual interest in avoiding disclosure of personal matters and (2) the interest of independence in making certain kinds of important decisions.<sup>7</sup>

Virtually every governmental action interferes with personal privacy to some degree.<sup>8</sup> The question in each case is whether that interference violates a command of the U.S. Constitution.<sup>9</sup>

#### (a) 14th Amendment

We find the U.S. Supreme Court opinion in *Whalen v. Roe*<sup>10</sup> to be dispositive of Wiedeman's arguments under the 14th Amendment. In *Whalen*, the U.S. Supreme Court held that the collection of narcotics prescription records in a database accessible to certain health department employees and investigators—and also to general law enforcement pursuant to

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<sup>5</sup> See, *Omni v. Nebraska Foster Care Review Bd.*, 277 Neb. 641, 764 N.W.2d 398 (2009); *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007).

<sup>6</sup> *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005).

<sup>7</sup> *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

<sup>8</sup> *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

<sup>9</sup> *Id.*

<sup>10</sup> *Whalen v. Roe*, *supra* note 7.

a judicial subpoena or court order—did not violate the 14th Amendment right to privacy.<sup>11</sup>

[6] The Court found that the reporting and monitoring of prescription records was a rational exercise of the state's broad police powers and that it is "well settled that the State has broad police powers in regulating the administration of drugs by the health professions."<sup>12</sup> Further, it was reasonable for the state to believe that the recording program would have a deterrent effect on potential violators and that it would aid in the detection or investigation of specific instances of abuse or misuse of dangerous drugs.<sup>13</sup>

The Court then concluded that the program did not "pose a sufficiently grievous threat to either [14th Amendment privacy] interest to establish a constitutional violation."<sup>14</sup> Concerning the interest in avoiding disclosure of personal matters, the Court found that the recording program contained adequate safeguards against disclosure of prescription records to the general public. Although prescription records were automatically disclosed to certain state employees, the Court found such disclosures were not meaningfully distinguishable from "a host of other unpleasant invasions of privacy that are associated with many facets of health care."<sup>15</sup> Patients must disclose private medical information to "doctors, to hospital personnel, to insurance companies, and to public health agencies, . . . even when the disclosure may reflect unfavorably on the character of the patient."<sup>16</sup>

As for the privacy interest of independence in making certain kinds of important decisions, the Court held that the recording program did not deprive patients of their right to decide independently, with the advice of a physician, to use

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, 429 U.S. at 603 n.30.

<sup>13</sup> See *Whalen v. Roe*, *supra* note 7.

<sup>14</sup> *Id.*, 429 U.S. at 600.

<sup>15</sup> *Id.*, 429 U.S. at 602.

<sup>16</sup> *Id.*

the medication.<sup>17</sup> This was true despite the uncontested evidence that the program discouraged some patients from using monitored medications. The Court observed on this point that the state “no doubt could prohibit entirely the use of particular Schedule II drugs.”<sup>18</sup>

In sum, the prescription recordkeeping scheme considered in *Whalen* provided “proper concern with, and protection of, the individual’s interest in privacy.”<sup>19</sup> Therefore, it did not violate patients’ 14th Amendment privacy rights.

Nebraska does not have a centralized database for prescription records, but instead mandates that such records be kept by the pharmacies for a period of 5 years.<sup>20</sup> Nebraska law provides protection against dissemination of these prescription records to the general public. Neb. Rev. Stat. § 38-2868 (Reissue 2008) states that pharmacy records shall be privileged and confidential and may be released only to the patient, caregiver, or others authorized by the patient or his or her legal representative; the treating physician; other physicians or pharmacists when such release is necessary to protect patient health or well-being; or other persons or governmental agencies authorized by law to receive such information.

[7,8] Weighing the State’s significant interest in the regulation of potentially dangerous and addictive narcotic drugs against the minimal interference with one’s ability to make medical decisions and the protections from broader dissemination to the general public, we find the State did not violate Wiedeman’s 14th Amendment privacy rights through its warrantless, investigatory access to her prescription records pursuant to § 28-414. Other courts have explained that patients’ substantive 14th Amendment privacy interests in prescription records are “limited to the right not to have the information

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<sup>17</sup> *Whalen v. Roe*, *supra* note 7.

<sup>18</sup> *Id.*, 429 U.S. at 603.

<sup>19</sup> *Id.*, 429 U.S. at 605.

<sup>20</sup> See Neb. Rev. Stat. § 28-411 (Reissue 2008) and § 28-414.

disclosed to the general public.”<sup>21</sup> We agree. A legitimate request for prescription information or records by a public official responsible for safeguarding public health and safety, subject to safeguards against further dissemination of those records, does not impermissibly invade any 14th Amendment right to privacy.<sup>22</sup> Having so concluded, we find no support for Wiedeman’s suggestion that the 14th Amendment demands a special process for access to her prescription records or for the use of such records in court. We note that Wiedeman did not allege that Jackson’s investigation of the prescription records was for a discriminatory or arbitrary purpose or for anything other than a legitimate investigatory purpose.

(b) Fourth Amendment

[9-11] We next address Wiedeman’s claims under the Fourth Amendment. The U.S. Supreme Court has said a “search” under the Fourth Amendment occurs whenever an “expectation of privacy that society is prepared to consider reasonable is infringed.”<sup>23</sup> A reasonable expectation of privacy is an expectation that has a source outside of the Fourth Amendment, by reference either to concepts of real or personal property law or to understandings that are recognized and permitted by society.<sup>24</sup> Under the reasonable-expectation-of-privacy test, however, “the four items listed in the [Fourth] Amendment as the protected objects remain central to understanding the scope of what the Amendment protects.”<sup>25</sup> Otherwise, “the

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<sup>21</sup> *Stone v. Stow*, 64 Ohio St. 3d 156, 166, 593 N.E.2d 294, 301 (1992). See, also, *State v. Russo*, 259 Conn. 436, 790 A.2d 1132 (2002).

<sup>22</sup> See, *Whalen v. Roe*, *supra* note 7; *State v. Russo*, *supra* note 21.

<sup>23</sup> *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

<sup>24</sup> See *U.S. v. Jones*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).

<sup>25</sup> Thomas K. Clancy, *The Fourth Amendment, Its History and Interpretation* 10 (2008). See, also, e.g., *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991); *State v. Harms*, 233 Neb. 882, 449 N.W.2d 1 (1989).

phrase ‘in their persons, houses, papers, and effects’ would have been superfluous.”<sup>26</sup>

The investigatory inquiry into prescription records is distinguishable from the invasion of the “person” that occurs during drug or alcohol testing.<sup>27</sup> Wiedeman had no ownership or possessory interest in the pharmacies from where the records were obtained. And, even though they may concern Wiedeman, the prescription records are not Wiedeman’s effects or papers.

In *State v. Cody*,<sup>28</sup> we explained:

“Property ownership is one factor to consider in determining whether a defendant has a reasonable expectation of privacy. . . . Other factors include the nature of the place searched, . . . whether the defendant had a possessory interest in the thing seized or the place searched, whether the defendant had a right to exclude others from that place, whether the defendant exhibited a subjective expectation that the place would remain free from governmental intrusion, whether the defendant took precautions to maintain privacy, and whether the defendant was legitimately on or in possession of the premises searched.”

We generally ask whether the defendant owned the premises, property, place, or space, and whether the defendant had dominion or control over such things or places based on permission from the owner.<sup>29</sup> Wiedeman fails to have any interest in the prescription records under any of these property-based

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<sup>26</sup> *U.S. v. Jones*, *supra* note 24, 132 S. Ct. at 949.

<sup>27</sup> See, *Ferguson v. Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995); *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

<sup>28</sup> *State v. Cody*, 248 Neb. 683, 694, 539 N.W.2d 18, 26 (1995).

<sup>29</sup> See, *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011); *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010); *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993); *State v. Trahan*, 229 Neb. 683, 428 N.W.2d 619 (1988).

tests. Fourth Amendment rights are personal rights; they may not be vicariously asserted.<sup>30</sup>

[12] If the expectation of privacy in a pharmacy's prescription records is not based in the four items listed in the Fourth Amendment, or in concepts of real or personal property law, then it can only be reasonable if so recognized and permitted by society.<sup>31</sup> Societal expectations as to prescription records were aptly described by the Washington Court of Appeals:

When a patient brings a prescription to a pharmacist, the patient has a right to expect that his or her use of a particular drug will not be disclosed arbitrarily or randomly. But a reasonable patient buying narcotic prescription drugs knows or should know that the State, which outlaws the distribution and use of such drugs without a prescription, will keep careful watch over the flow of such drugs from pharmacies to patients.<sup>32</sup>

While the state cannot take away an established societal expectation of privacy through the mere passage of a law,<sup>33</sup> there is a long history of governmental scrutiny in the area of narcotics and other controlled substances. All states highly regulate prescription narcotics, and many state statutes specifically allow for law enforcement investigatory access to those records without a warrant.<sup>34</sup> This well-known and long-established regulatory history significantly diminishes any societal expectation of privacy against governmental investigation of narcotics prescriptions.

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<sup>30</sup> See *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). See, also, *State v. Cody*, *supra* note 28.

<sup>31</sup> See *U.S. v. Jones*, *supra* note 24.

<sup>32</sup> *Murphy v. State*, 115 Wash. App. 297, 312, 62 P.3d 533, 541 (2003). See, also, e.g., *State v. Russo*, *supra* note 21.

<sup>33</sup> See, e.g., *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

<sup>34</sup> See 50 State Statutory Surveys, Health Care Records and Recordkeeping, 0100 Surveys 53 (West 2012).

[13] Furthermore, the U.S. Supreme Court has repeatedly said there is no reasonable expectation of privacy in personal information a defendant knowingly exposes to third parties.<sup>35</sup> This is true even when the information revealed to the third party is revealed on the assumption that it will be used only for a limited purpose and on the assumption that the confidence in the third party will not be betrayed.<sup>36</sup>

Thus, there is no reasonable expectation of privacy in situations such as the numerical information conveyed to a telephone company of the numbers dialed,<sup>37</sup> financial records given to an accountant,<sup>38</sup> or personal account records maintained at one's bank.<sup>39</sup> In *State v. Kenny*,<sup>40</sup> we held that the defendant had no reasonable expectation of privacy in letters he sent through the mail. We explained that while the defendant "may have hoped for privacy, . . . he had no 'expectation of privacy' as contemplated by the fourth amendment to the U.S. Constitution."<sup>41</sup>

In *Whalen*,<sup>42</sup> the U.S. Supreme Court addressed the appellees' Fourth Amendment arguments in a footnote. With little explanation, the Court held that a prescription recordkeeping scheme also did not violate any privacy right emanating from the Fourth Amendment.<sup>43</sup> *Whalen* may be distinguishable to the extent that the Court was not presented with a targeted

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<sup>35</sup> *Smith v. Maryland*, *supra* note 33; *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976); *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973); *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *Lopez v. United States*, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963).

<sup>36</sup> *United States v. Miller*, *supra* note 35. See, also, *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971); *Hoffa v. United States*, *supra* note 35; *Lopez v. United States*, *supra* note 35.

<sup>37</sup> *Smith v. Maryland*, *supra* note 33.

<sup>38</sup> *Couch v. United States*, *supra* note 35.

<sup>39</sup> *United States v. Miller*, *supra* note 35.

<sup>40</sup> *State v. Kenny*, 224 Neb. 638, 399 N.W.2d 821 (1987).

<sup>41</sup> *Id.* at 642, 399 N.W.2d at 824.

<sup>42</sup> *Whalen v. Roe*, *supra* note 7.

<sup>43</sup> *Id.*

police investigation.<sup>44</sup> Nevertheless, we find *Whalen* to be persuasive authority for the conclusion that disclosure by a pharmacy of patient prescription records to law enforcement is not a search from the standpoint of the patient.

The desire for medical care will not negate the voluntariness of the disclosure to third-party pharmacies.<sup>45</sup> The desire to have a checking account or credit card, to use a telephone, or to mail a letter does not negate the voluntariness of the disclosure to the entities necessary for those important services. Indeed, the Court in *Whalen* suggested that there is no right to narcotic drugs at all; the state would be within its power to prohibit access to such drugs altogether. While there is a trust relationship between the pharmacy and the patient, cases such as *Smith v. Maryland*,<sup>46</sup> *United States v. Miller*,<sup>47</sup> *Couch v. United States*,<sup>48</sup> and *Kenny*<sup>49</sup> hold that disclosure, even on the assumption that the confidence in the third party will not be betrayed,<sup>50</sup> negates any expectation of privacy cognizable under the Fourth Amendment.

The court in *Williams v. Com.*<sup>51</sup> thus held that the law enforcement investigation of prescription records under a law similar to § 28-414 is not a search under the Fourth Amendment. Noting the proposition that what is voluntarily exposed to the public is not subject to Fourth Amendment protections, the court concluded that its citizens “have no reasonable expectation of privacy in this limited examination of and access to their prescription records.”<sup>52</sup> The court further explained that “it is well known by citizens that any

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<sup>44</sup> See, e.g., *United States v. Miller*, *supra* note 35; *Ferguson v. Charleston*, *supra* note 27.

<sup>45</sup> See *Ferguson v. Charleston*, *supra* note 27.

<sup>46</sup> *Smith v. Maryland*, *supra* note 33.

<sup>47</sup> *United States v. Miller*, *supra* note 35.

<sup>48</sup> *Couch v. United States*, *supra* note 35.

<sup>49</sup> *State v. Kenny*, *supra* note 40.

<sup>50</sup> See cases cited *supra* note 36.

<sup>51</sup> *Williams v. Com.*, 213 S.W.3d 671 (Ky. 2006).

<sup>52</sup> *Id.* at 682.

prescriptions they receive and fill will be conveyed to several third parties, including their physician, their pharmacy, and their health insurance company.”<sup>53</sup> And “pharmacy records have long been subject not only to use and inspection by [those entities] but also to inspection by law enforcement and state regulatory agencies.”<sup>54</sup>

The court in *Williams* opined that it would be “mindful” of its duty to jealously protect the freedoms of the Fourth Amendment and would hold differently if it “perceived some sort of manipulation of these well-recognized freedoms by the state.”<sup>55</sup> But it did not find such manipulation in the case of law enforcement’s obtaining prescription records from businesses that keep those records in the ordinary course of business and pursuant to a statutory obligation to do so.<sup>56</sup>

[14,15] We agree that an investigatory inquiry into prescription records in the possession of a pharmacy is not a search pertaining to the pharmacy patient. A patient who has given his or her prescription to a pharmacy in order to fill it has no legitimate expectation that governmental inquiries will not occur.

[16] Issuance of a subpoena to a third party to obtain records does not violate the rights of a defendant about whom the records pertain, even if a criminal prosecution is contemplated at the time the subpoena is issued.<sup>57</sup> The U.S. Supreme Court in *Miller* explained that the bank in possession of account records, not the customer whom they concern, has standing to challenge a subpoena.<sup>58</sup> Although it may be “unattractive” for a business not to notify its customer of the subpoena, such lack of notification is simply “without legal consequences” under the Fourth Amendment.<sup>59</sup>

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<sup>53</sup> *Id.* at 683.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* See, also, *State v. Welch*, 160 Vt. 70, 624 A.2d 1105 (1992).

<sup>57</sup> See *United States v. Miller*, *supra* note 35.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, 425 U.S. at 443 n.5.

Wiedeman lacks standing to challenge the manner of the State's inquiry into the prescription records or the constitutional or statutory adequacy of the subpoenas offered and not offered into evidence. There is no argument on appeal that there is insufficient foundation for the prescription records or that the prescription records are not what they purport to be. We find no merit to Wiedeman's assertion that the admission of the pharmacy records violated her constitutional or statutory rights.

## 2. FAILURE TO SUPPRESS MEDICAL RECORDS

[17] Next, Wiedeman argues that her medical records should have been suppressed because the warrant for her medical records lacked probable cause. In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test.<sup>60</sup> The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.<sup>61</sup>

Aside from the argument that the prescription records should have been stricken—an argument we conclude has no merit due to our analysis above—Wiedeman asserts that the probable cause affidavit was insufficient because it failed to disclose information about any false or misleading statement made by her. In the affidavit, Jackson explained that Harriger, a nurse practitioner, had contacted him with concerns that Wiedeman was abusing prescription drugs. Harriger had become suspicious that Wiedeman was traveling a significant distance to the clinic. Harriger contacted a couple of pharmacies that confirmed Wiedeman was seeing several doctors and filling multiple narcotics prescriptions at different pharmacies. This information, combined with the prescription records that revealed Wiedeman was filling multiple prescriptions at multiple pharmacies for an extraordinary number of pills,

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<sup>60</sup> *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

<sup>61</sup> *Id.*

established probable cause. We find no merit to this assignment of error.

### 3. SUFFICIENCY OF EVIDENCE

Lastly, Wiedeman challenges the sufficiency of the evidence to support her conviction of 10 counts of violating § 28-418. In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.<sup>62</sup> The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>63</sup>

Section 28-418 states it shall be unlawful for any person “knowingly or intentionally . . . [t]o acquire or obtain or to attempt to acquire or obtain possession of a controlled substance by theft, misrepresentation, fraud, forgery, deception, or subterfuge”<sup>64</sup> or “[t]o communicate information to a practitioner in an effort to unlawfully procure a controlled substance . . . or a medical order for a controlled substance issued by a practitioner authorized to prescribe.”<sup>65</sup>

We find no merit to Wiedeman’s argument that filling multiple prescriptions obtained by virtue of a single misrepresentation or act of deception is but a single violation. The statute plainly states that a violation occurs upon the act of acquiring or obtaining. Section 28-418 does not state that each act of acquiring or obtaining must be accompanied by a new act of misrepresentation or deception. When the act of obtaining the prescription was facilitated by a continuing deception based on a single conversation or other event, the statute is satisfied.

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<sup>62</sup> *State v. McCave*, *supra* note 2.

<sup>63</sup> *Id.*

<sup>64</sup> § 28-418(1)(c).

<sup>65</sup> § 28-418(1)(i).

The court did not err in concluding that Wiedeman committed multiple violations of § 28-418 each time she obtained and filled a prescription from Cheloha. Each prescription from Cheloha would not have been written but for Wiedeman's failure to disclose that she was already taking narcotics through prescriptions from other providers.

We also find no merit to Wiedeman's claim that she never affirmatively acted in a way that could violate § 28-418, because she did not "affirmatively" provide fraudulent or false information to anyone. Pointing out dictionary definitions of "misrepresentation," "fraud," "deception," and "subterfuge," Wiedeman argues that in order to violate § 28-418, there must be "[s]ome word or deed that hides or misleads the one who relies upon the act or deed."<sup>66</sup>

Even accepting Wiedeman's definitions, we find the record more than adequate to support the trial court's findings. It is apparent that Wiedeman affirmatively misrepresented her medical history. Particularly, Wiedeman told Cheloha she had once "tried" her mother's narcotic medications, but otherwise relied on over-the-counter ibuprofen for her pain. In fact, at the time of her first visit to Cheloha, Wiedeman had been averaging 200 pills per month since September 2009, more than the maximum dosage. With the addition of the prescriptions by Cheloha, Wiedeman was able to obtain an average of over 400 pills per month. Wiedeman admitted to Jackson that she knew Cheloha would not have written all the prescriptions for her had she told Cheloha about the other medical providers and her other prescriptions. The pain contract Wiedeman signed with Laux in January 2009 is further evidence of such knowledge. We find the evidence sufficient to support the convictions.

## VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.

CASSEL, J., not participating.

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<sup>66</sup> Brief for appellant at 13.

CONNOLLY, J., dissenting.

The Fourth Amendment forbids a government agent's intrusion into a person's legitimate expectation of privacy to search for evidence of a crime without judicial oversight and probable cause. Such searches are per se unreasonable, subject only to a few well-defined exceptions.<sup>1</sup> Here, no exceptions apply.

But the majority opinion concludes that if a citizen presents a prescription order for a narcotic drug at a pharmacy, he has no expectation that the information will remain private because (1) he voluntarily disclosed the prescription and (2) the government heavily regulates the dispensing of narcotics. The majority reasons that once a person gives the prescription to a pharmacist, it is no longer private information. Thus, a prosecutor can subpoena a person's prescription records without violating the Fourth Amendment; i.e., no search of personal information occurs if the target of a criminal investigation has publicly exposed it.

I believe that this decision will have far-reaching effects for citizens' Fourth Amendment protections. Information that citizens normally considered private will not be protected by the Fourth Amendment if it is held by a third party that is subject to extensive regulation. And as we know, many human activities are subject to extensive federal and state regulations: e.g., banking, investing, attending school, or seeking medical or psychiatric care. But if an individual is suspected of a crime and his personal information is held by a third party that is subject to regulation, the majority would permit the state—without probable cause or court order—to invade by subpoena a citizen's protected zone of privacy.

According to the majority opinion, because Wiedeman gave her prescriptions to a pharmacist, she voluntarily disclosed this information and had no expectation of privacy in her personal medical information. This "voluntarily disclosed" rationale will not be limited to narcotic prescriptions. It necessarily

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<sup>1</sup> *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

means that if a citizen presents a prescription to a pharmacist, he or she has voluntarily disclosed any medical information disclosed by the prescription. Nor will the “voluntarily disclosed” rationale be limited to prescription orders. And I do not believe this result is required by or consistent with the U.S. Supreme Court’s decision in *Whalen v. Roe*.<sup>2</sup>

The majority opinion misinterprets the Court’s decision in *Whalen*. It did not hold that citizens have no reasonable expectation of privacy in their prescription records. There, the plaintiffs were physicians and patients who challenged a state statutory scheme that required doctors and pharmacists to report prescriptions for narcotic drugs to a state agency. The plaintiffs challenged the act as an invasion of the patients’ privacy interests; i.e., its potential to disclose their private medical information would have a chilling effect on a patient’s or a doctor’s medical decisions.

Notably, the Court did not disturb the lower court’s ruling that the doctor-patient relationship is one of the “zones of privacy” accorded constitutional protection<sup>3</sup>:

An individual’s physical ills and disabilities, the medication he takes, [and] the frequency of his medical consultation are among the most sensitive of personal and psychological sensibilities. One does not normally expect to be required to have to reveal to a government source, at least in our society, these facets of one’s life. Indeed, generally one is wont to feel that this is nobody’s business but his doctor’s and his pharmacist’s.<sup>4</sup>

Instead, the Court held that the act did not violate patients’ privacy interests under the 14th Amendment because its safeguards adequately protected their interests in keeping their medical information confidential. Because *Whalen* was not a criminal case, no one challenged the law as authorizing a warrantless search of a person’s prescription records during a targeted criminal investigation. More important, the Court’s

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<sup>2</sup> *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

<sup>3</sup> See *Roe v. Ingraham*, 403 F. Supp. 931, 935 (S.D.N.Y. 1975), *reversed*, *Whalen*, *supra* note 2.

<sup>4</sup> *Id.* at 937.

reasoning in *Whalen* refutes the majority's reliance on the "voluntarily disclosed" rationale.

The *Whalen* Court stated that a public disclosure of a patient's medical information could only occur in three circumstances: (1) if a state official violated the law and deliberately or negligently disclosed the information; (2) if the state accused a doctor or patient of violating the law and offered the data as evidence in a judicial proceeding; and (3) if a doctor, pharmacist, or patient "*voluntarily reveal[ed] information on a prescription form.*"<sup>5</sup>

Obviously, a prescription must be revealed to a pharmacist. But the Court did not consider the mere act of presenting a prescription order to a pharmacist to be a public disclosure of medical information that negates a person's expectation of privacy in the information. The Court's reasoning in *Whalen* shows that the majority opinion's reliance on the Court's earlier decision in *United States v. Miller*<sup>6</sup> is misplaced. The *Whalen* Court did not follow the "voluntarily disclosed" reasoning of *Miller*, and the different result reached in these decisions is not surprising. The information contained in the banking records subpoenaed in *Miller* is not comparable to the private medical information that our prescription records reveal about our physical ailments and medical decisions.

Equally important, if the plaintiff patients had no expectation of privacy in their prescription records, the Court in *Whalen* would not have decided whether the information was adequately protected. So, contrary to the majority's conclusion, federal appellate courts have specifically interpreted *Whalen* as recognizing a right of privacy in a person's prescription records and medical information.<sup>7</sup>

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<sup>5</sup> *Whalen*, *supra* note 2, 429 U.S. at 600 (emphasis supplied).

<sup>6</sup> *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976).

<sup>7</sup> See, *Douglas v. Dobbs*, 419 F.3d 1097 (10th Cir. 2005); *Doe v. Southeastern Penn. Transp. Auth. (SEPTA)*, 72 F.3d 1133 (3d Cir. 1995); *Murphy v. Townsend*, Nos. 98-35360, 98-35434, 98-35481, 1999 WL 439468 (9th Cir. June 22, 1999) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 187 F.3d 648 (9th Cir. 1999)).

The Court stated that the remote possibility of inadequate judicial supervision of the information, if used as evidence, was not a reason for invalidating the entire program.<sup>8</sup> But importantly, it did not decide how state agents could obtain the evidence initially or what judicial supervision was required under the Fourth Amendment. It specifically declined to decide “any question which might be presented by the unwarranted disclosure.”<sup>9</sup> And the facts from the lower court’s decision showed only that state agents had discovered evidence of drug crimes during administrative inspections—not targeted criminal investigations.<sup>10</sup>

In short, *Whalen* is not persuasive authority that a state agent’s subpoena of a person’s prescription records for a criminal investigation does not violate the Fourth Amendment. This issue was simply not presented. The majority opinion mistakenly concludes that the Court persuasively addressed the Fourth Amendment issue in a footnote. In that footnote, the Court addressed only the plaintiffs’ argument that the Fourth Amendment’s protection of privacy interests from unreasonable government intrusions was a source of a general guarantee of privacy emanating from the federal Constitution.<sup>11</sup>

The Court’s statement that the Fourth Amendment cannot be translated into a general right to privacy under the Constitution was not a new pronouncement.<sup>12</sup> But the Court’s statement did not authorize a warrantless government intrusion into a legitimate expectation of privacy for a targeted criminal investigation. As stated, such searches are per se unreasonable.

It is true that “[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, *either by* reference to concepts of real or personal property law or to understandings that are recognized and permitted by

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<sup>8</sup> *Whalen*, *supra* note 2.

<sup>9</sup> *Id.*, 429 U.S. at 605.

<sup>10</sup> See *Roe*, *supra* note 3.

<sup>11</sup> *Whalen*, *supra* note 2.

<sup>12</sup> See *Katz*, *supra* note 1.

society.’”<sup>13</sup> As the majority opinion states, “A ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”<sup>14</sup>

But the U.S. Supreme Court has rejected the majority’s cheapening of nonpossessory privacy interests: “[O]nce it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”<sup>15</sup> The Fourth Amendment’s protection of legitimate nonpossessory privacy interests adds to the Amendment’s baseline protections without subtracting from its protection against a physical intrusion of a constitutionally protected area.<sup>16</sup>

And in *Whalen*, the Court clearly recognized that individuals have a legitimate expectation of privacy in their prescription records. Other courts have also recognized this expectation, under both federal law and state law.<sup>17</sup> These cases strongly support the conclusion that we, as a society, consider prescription records to contain our most private and sensitive information about our physical ailments and medical decisions. To skirt this problem, the majority opinion must ignore obvious flaws in putting a targeted criminal investigation on equal footing with crimes discovered during administrative inspections, as in *Whalen*.

Obviously, many states have statutes that allow state agents to inspect a pharmacy’s prescription records without a warrant.

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<sup>13</sup> *United States v. Jacobsen*, 466 U.S. 109, 123 n.22, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) (emphasis supplied).

<sup>14</sup> See *id.*, 466 U.S. at 113. Accord *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

<sup>15</sup> *Katz*, *supra* note 1, 389 U.S. at 353.

<sup>16</sup> See *Florida v. Jardines*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

<sup>17</sup> See, *Douglas*, *supra* note 7; *Doe*, *supra* note 7; *King v. State*, 272 Ga. 788, 535 S.E.2d 492 (2000); *State v. Skinner*, 10 So. 3d 1212 (La. 2009); *State v. Bilant*, 307 Mont. 113, 36 P.3d 883 (2001); *Murphy*, *supra* note 7. See, also, *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000).

These statutes exist because agency officials or law enforcement officers can conduct warrantless administrative inspections of highly regulated businesses only if the state has an authorizing statute.<sup>18</sup> Such inspections fall into the “special needs” exception to the warrant requirement.<sup>19</sup> Because businesses like pharmacies are highly regulated, the owners have a reduced expectation of the privacy in their *business* records and can be subjected to warrantless inspections.<sup>20</sup> But the majority opinion ignores Nebraska’s statutory provisions that show the Legislature did not intend to permit administrative inspections to be used for criminal investigations.<sup>21</sup> And state statutes cannot define what the Fourth Amendment requires for government intrusions into private information for targeted criminal investigations.

Unlike administrative inspections of pharmacies, the Fourth Amendment’s warrant and probable cause exceptions cannot apply to targeted criminal investigations into a person’s prescription records. First, probable cause is not required for administrative inspections because they are “neither personal in nature nor aimed at the discovery of evidence of crime.”<sup>22</sup> But that is obviously not true of a targeted search conducted with particularized suspicion of a crime, as in this case. And the Supreme Court has specifically held that government agents cannot use administrative inspections to search for evidence of a crime in a targeted investigation.<sup>23</sup> Second, the Court has

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<sup>18</sup> See, *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972); *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967); Annot., 53 A.L.R.4th 1168 (1987) (explaining history).

<sup>19</sup> See, *Burger*, *supra* note 18; Annot., 29 A.L.R.4th 264 (1984).

<sup>20</sup> See *id.*

<sup>21</sup> See Neb. Rev. Stat. §§ 28-428 and 81-119 (Reissue 2008).

<sup>22</sup> *Camara v. Municipal Court*, 387 U.S. 523, 537, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

<sup>23</sup> See, e.g., *Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984); *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978); *Donovan v. Dewey*, 452 U.S. 594, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981).

never held that because the medical industry is highly regulated, patients have a reduced expectation of privacy in their medical information held by medical institutions. To the contrary, it has held that the “special needs” exception applies only if the reason for a search is divorced from the State’s general interest in law enforcement.

In *Ferguson v. Charleston*,<sup>24</sup> the U.S. Supreme Court addressed the involvement of law enforcement in obtaining medical diagnostic testing results. There, state hospital employees coordinated with law enforcement agents to develop a program of testing urine samples of pregnant women for evidence of cocaine use. If the urine samples tested positive for cocaine, the hospital employees reported the women to law enforcement agents, who used the information to coerce the women into drug treatment or to charge them with drug offenses. The Court concluded that the urine tests were searches that did not fall into the special needs exception. It distinguished other urine tests that it had upheld under the special needs exception. It concluded that the hospital’s reporting of the testing results to law enforcement agents specifically to incriminate the women was a more significant privacy intrusion and was contrary to patients’ reasonable expectations of privacy in their medical information:

The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties. The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent. . . . In none of our prior cases was there any intrusion upon that kind of expectation.

The critical difference between those four drug-testing cases and this one, however, lies in the nature of the

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<sup>24</sup> *Ferguson v. Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001).

“special need” asserted as justification for the warrantless searches. *In each of those earlier cases, the “special need” that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement. . . .* In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment. This fact distinguishes this case from circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under the rules of law or ethics is subject to reporting requirements . . . .<sup>25</sup>

I believe that the same reasoning must apply here:

If [medical] records are private, then so must be records of prescription medications. . . . [M]edical science has improved and specialized its medications. It is now possible from looking at an individual’s prescription records to determine that person’s illnesses, or even to ascertain such private facts as whether a woman is attempting to conceive a child through the use of fertility drugs. This information is precisely the sort intended to be protected by penumbras of privacy. *See Eisenstadt v. Baird*, 405 U.S. 438, 450, 92 S.Ct. 1029, 1036, 31 L.Ed.2d 349 (1972) (“If the right to privacy means anything, it is the right of the individual . . . to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). An individual using prescription drugs has a right to expect that such information will customarily remain private.<sup>26</sup>

If state agents had discovered evidence of Wiedeman’s crime during a valid administrative inspection of pharmacy

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<sup>25</sup> *Id.*, 532 U.S. at 78-81 (emphasis supplied). See, also, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

<sup>26</sup> *Doe*, *supra* note 7, 72 F.3d at 1138.

records, I would agree that she had no reason to complain.<sup>27</sup> But this case does not present those facts. Because law enforcement agents sought Wiedeman's records solely to incriminate her in a targeted investigation, the search was not an administrative inspection and did not fall within the special needs exception.

In short, targeted criminal investigations are distinct from other types of government searches. And once a court recognizes that citizens have legitimate expectations of privacy in their prescription records, which many courts have done, the Fourth Amendment requires probable cause and a warrant before intruding on that interest. Because I believe that Wiedeman had a legitimate expectation of privacy in her prescription records, she was entitled to challenge the search of these records without a warrant and her challenge had merit.

The Fourth Amendment does not prevent law enforcement agents from searching private information for a criminal investigation if the agents comply with its procedural protections of that information. I think most Nebraskans will be surprised to learn that by filling their prescription orders, they have publicly disclosed the medical information revealed by those orders. They likely did not suspect that a prosecutor, without any judicial oversight, could obtain their prescription records merely by issuing a subpoena. For these reasons, I cannot join the majority's opinion.

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<sup>27</sup> See, *Burger*, *supra* note 18; *Stone v. Stow*, 64 Ohio St. 3d 156, 593 N.E.2d 294 (1992).

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MARY KAY YOUNG, AN INDIVIDUAL, APPELLANT, V.  
GOVIER & MILONE, L.L.P., ET AL., APPELLEES.  
835 N.W.2d 684

Filed July 12, 2013. No. S-11-959.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show

that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
3. **Attorney and Client: Malpractice: Negligence: Proof.** A client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence.
4. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
5. **Malpractice: Attorney and Client.** In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances.
6. \_\_\_\_: \_\_\_\_\_. Although the general standard of an attorney's conduct is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact.
7. **Attorney and Client: Expert Witnesses.** Expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith.
8. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
9. **Summary Judgment: Expert Witnesses: Testimony.** A conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment.
10. **Malpractice: Attorney and Client: Negligence: Proof.** In an action for legal malpractice, the plaintiff must establish that but for the alleged negligence of the attorney, the plaintiff would have obtained a more favorable judgment or settlement.
11. **Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
12. **Res Judicata: Judgments: Collateral Attack.** Res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action; stated another way, judgments entered by a court without jurisdiction are void and subject to collateral attack.

13. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.
14. \_\_\_\_: \_\_\_\_\_. Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
15. **Res Judicata: Judgments.** Summary judgments, judgments on a directed verdict, judgments after trial, default judgments, and consent judgments are all generally considered to be on the merits for purposes of res judicata.
16. **Judges: Recusal.** Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.
17. **Judges: Recusal: Proof.** In order to demonstrate that a trial judge should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

James D. Sherrets, Diana J. Vogt, and Thomas D. Prickett, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

James M. Bausch and Mary Kay O'Connor, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., et al.

William M. Lamson, Jr., and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for appellees Govier & Milone, L.L.P., and Pamela Hogenson Govier.

HEAVICAN, C.J., CONNOLLY, STEPHAN, McCORMACK, and CASSEL, JJ.

STEPHAN, J.

In this professional negligence case, Mary Kay Young, formerly Mary Kay Davis, filed a complaint against several law firms and individual attorneys who represented her in a marital dissolution proceeding. Young's former husband, Henry Davis, filed for dissolution in July 2001. While that action was pending, the parties reconciled. As part of the reconciliation, they entered into two postmarital agreements which specified how their property would be divided in the

event of a future dissolution. At the request of both parties, the district court for Douglas County approved the postmarital agreements and dismissed the dissolution proceeding without prejudice.

Subsequently, Young filed a second dissolution proceeding in which she was represented by the law firms and attorneys who are the appellees in this case. Eventually, on the advice of these attorneys, Young accepted a settlement proposal from Davis which was based upon the postmarital agreements approved in the first dissolution action, and the marriage was dissolved.

Young later brought this action in which she alleged that her attorneys were negligent in advising her to accept the settlement proposal from Davis. The district court sustained the appellees' motions for summary judgment. It reasoned that the actions of the attorneys were not the proximate cause of any damage to Young, because she could not show that her recovery in the dissolution proceeding would have been greater but for the allegedly negligent advice of the attorneys. The court specifically found that under the doctrines of *res judicata* and judicial estoppel, the order in the first dissolution proceeding which approved the parties' postmarital agreements was binding on the court in the second proceeding.

Young appeals. We affirm the judgment of the district court.

## I. BACKGROUND AND PROCEDURAL HISTORY

Young and Davis were married on January 7, 1989, in Omaha, Nebraska. Two children were born during the marriage.

### 1. FIRST DISSOLUTION PROCEEDING

Davis filed a petition for dissolution of the marriage on July 23, 2001, in the district court for Douglas County. Young filed a cross-petition on July 26. While this proceeding was pending, Young and Davis entered into a postmarital agreement (PMA) in which they acknowledged marital difficulties. The PMA included covenants given "in consideration of the continuation of the marriage of the parties, and in consideration of the mutual promises, waivers and releases" made by each party. The PMA provided that Davis' ownership interest in a

meatpacking company would be considered separate nonmarital property and that his salary, earnings, and stock in the company would always be considered as such.

In the PMA, the parties identified marital property, which included cash, stocks, life insurance, jewelry, automobiles, a home, and a residential lot. The total value of the listed property was more than \$6.28 million. The PMA provided that in the event of divorce, Young would receive \$3 million; the Jaguar automobile; and her clothing, personal effects, and jewelry. Davis would retain the other assets, including the home and the residential lot. Young agreed to renounce any claim to Davis' nonmarital assets. The PMA further provided that Young would not receive alimony or additional property. According to the PMA, any marital home acquired by either party during the continuation of the marriage would be titled in the name of the person whose separate property was used for the purchase. If they purchased property together, it was to be titled in both names as tenants in common without rights of survivorship. All income earned by either party during the continuation of the marriage was to remain separate property.

The PMA stated that each party had received the advice of counsel and was entering into the agreement freely and voluntarily, free and clear of any duress or undue influence from the other party, and with full knowledge and access to any necessary information. If either party was required to bring legal action against the other to enforce rights under the PMA, or if either attempted to challenge or set aside any term of the agreement, the prevailing party would be entitled to recover costs and expenses, including reasonable attorney fees. Each party agreed that the terms of the agreement were fair, reasonable, not unconscionable, and equitable.

The PMA was signed on November 26, 2001. On January 9, 2002, Davis was given leave to dismiss his petition for dissolution without prejudice. Young was given leave to file an amended cross-petition. In that pleading, filed on January 15, Young alleged that the marriage was irretrievably broken and should be dissolved. She also sought a declaratory judgment that the PMA was void because it was executed when she was under stress, duress, and emotional collapse and was

without control of her decisionmaking abilities. She alleged that because of her mental state, she did not knowingly, intelligently, or voluntarily execute the PMA, and that it was therefore null and void.

While Young's cross-petition was pending, Young and Davis participated in private mediation in which neither was represented by counsel. Young and Davis entered into an amended postmarital agreement (APMA) on April 17, 2002. The APMA incorporated the PMA by reference and attachment. Young signed the APMA against the advice of the attorneys who represented her in the dissolution proceeding and who are not parties to this action. The APMA included specific provisions contemplating continuation of the marriage. It provided that upon execution of the APMA and the dismissal of all pending litigation, Young and Davis would again live together with their children. They agreed to "continue participating in family counseling and/or family therapy to further facilitate their reconciliation." The APMA provided that neither it nor the PMA would be enforceable if Davis initiated a new action for dissolution or legal separation within 12 months, unless the action was based on evidence of Young's infidelity.

The APMA provided that Davis would pay the state and federal income taxes on the income Young earned from the \$3 million payment she was to receive under the PMA. Young was also to receive sole ownership of the parties' residence. In the event the marriage was dissolved, Young would receive alimony of \$12,500 per month for up to 10 years unless she remarried or she or Davis died. The APMA also provided that Young would receive an additional \$1 million on the fourth anniversary of the execution of the APMA, regardless of whether the parties were married at the time. The APMA further provided that if either party contested its terms, the prevailing party would be responsible for paying all attorney fees and costs.

The APMA included an agreement by both parties to dismiss all pending litigation between them, including "[Young's] declaratory judgment claim," which had been filed at the time of her cross-petition for dissolution. The APMA further provided that if counsel for either party desired, the terms of the

PMA and APMA would be submitted for approval to the court in which the action was pending. Like the PMA, the APMA included representations that it was executed by both parties voluntarily, without undue influence, and with a full understanding of its terms.

At a hearing on April 23, 2002, Young and Davis presented a stipulation asking the district court to approve the terms of the PMA and APMA, to dismiss the dissolution proceeding without prejudice, and to dismiss Young's declaratory judgment claim with prejudice. The stipulation expressly stated that dismissal of Young's declaratory judgment claim with prejudice would mean she would be precluded from challenging the validity of the PMA and APMA. The stipulation was not signed by counsel for either party, although both parties were represented by counsel at the hearing.

Davis' counsel called both parties to testify regarding their understanding of the PMA and APMA. Both testified that they intended to continue in their marital relationship upon resolving their differences with the PMA and APMA and that they understood both documents, considered them fair and reasonable, and were requesting the court's approval of them. Young testified that she understood that if her declaratory judgment action was dismissed with prejudice, the APMA would be binding on her. She also testified that she understood the declaratory judgment could be dismissed without the court's approving the PMA and APMA. Further questioning by the court elicited testimony from the parties regarding their educational backgrounds and the absence of any impairment to their ability to understand the proceedings. In an order entered on April 24, 2002, the court found that it had jurisdiction of the parties and the subject matter, approved the PMA and APMA, dismissed Young's declaratory judgment claim with prejudice, and dismissed Young's amended cross-petition for dissolution of marriage without prejudice.

## 2. SECOND DISSOLUTION PROCEEDING

Thereafter, the parties lived together for approximately 17 months. During that time, pursuant to the PMA and APMA,

Davis transferred ownership of the family residence, two automobiles, and \$3 million to Young.

On October 6, 2003, Young filed a petition for dissolution of the marriage. At that time, she was represented by Pamela Govier and the law firm of Govier, Milone & Streff, L.L.P. (Govier firm), and a second law firm that is not a party to this action. The case was assigned to a district court judge who had not been involved in the prior proceedings.

In his answer and cross-petition, Davis admitted Young's allegations that the marriage was irretrievably broken and that every reasonable effort to effect reconciliation had been made. He affirmatively alleged that the PMA and APMA controlled the determination of alimony and the distribution of real and personal property and that by virtue of the 2002 order approving the PMA and APMA, Young was barred from relitigating property and alimony issues by the doctrines of *res judicata*, collateral estoppel, and judicial estoppel. Davis sought custody of the parties' minor children, an order granting him exclusive occupancy of his residence, a decree of dissolution incorporating the terms of the PMA and APMA, and other relief, including attorney fees and costs.

In her reply, Young alleged that the PMA and APMA were "procured by fraud, duress, and without full disclosure" and were "unconscionable, unenforceable, void, and against public policy." Davis then filed a motion for partial summary judgment, asserting that the enforceability of the PMA and APMA had already been determined by a court and again asserting that Young was estopped from challenging their validity.

The court overruled Davis' motion for summary judgment, concluding that the PMA and APMA were unenforceable because they were made in contemplation of divorce, were not consistent with "statutes regarding post-marital agreements," and were contrary to public policy. Davis filed a motion for reconsideration, which the court also overruled.

The law firm which had originally served as cocounsel with the Govier firm withdrew from the case, and in August 2004, Young retained the law firm of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P. (Baird Holm firm), as

cocounsel with the Govier firm. William Dittrick, a partner in the Baird Holm firm, was primarily responsible for the firm's work on the case. Early in his involvement, Dittrick was advised by Govier that the district court had denied Davis' motion for partial summary judgment and had held that the PMA and APMA were unenforceable. That holding was reaffirmed in February 2006, when the district court overruled Davis' motion to bifurcate the trial in order to first determine the enforceability of the PMA and APMA. The court reaffirmed its prior order determining that the agreements were unenforceable.

But approximately 7 months later, the court, on its own motion, announced that it would reconsider its holding on Davis' motion for partial summary judgment. After additional briefing, the court reversed its prior order and sustained Davis' motion for partial summary judgment. The court reasoned that the April 2002 ruling that the PMA and APMA were fair, just, and not unconscionable is *res judicata* and bars further litigation between the parties.

Having prevailed on that critical issue, Davis proposed a settlement. He offered to abide by the PMA and APMA and to pay alimony of \$12,500 per month for 106 months and child support of \$60,000 per year for two children or \$36,000 per year for one child. He also offered to waive his claim for reimbursement of \$175,000 in attorney fees and waive any claim to additional attorney fees based on Young's challenge of the APMA. The offer stated that if the matter were not settled, Davis would seek reimbursement of the \$175,000, payment of all attorney fees and costs expended in defense of the PMA and APMA, and reduction of alimony for a term equal to one-half the length of the parties' actual cohabitation (88 months) less a credit for the alimony paid during the proceedings. The total alimony award would extend for an additional 64 months. He also would seek return of all personal property Young removed from Davis' home.

After consultation with her attorneys, Young agreed to accept the settlement offer. Dittrick stated in a letter dated December 4, 2006, that Young believed she must accept the terms of the settlement "because of the incredible economic

risk confronting her.” At a hearing on December 11, Davis testified that the parties had agreed that each would pay his or her own attorney fees and that he would not seek repayment of \$175,000 that had been previously ordered by the court. Young testified that she understood she had no alternative but to accept the settlement because she would face bankruptcy if she went to trial. She said that her attorneys had explained the situation to her in great detail and that she understood that neither party would appeal the settlement. The court approved the settlement agreement and, on December 11, entered an order of dissolution incorporating the PMA and APMA.

### 3. PROFESSIONAL NEGLIGENCE PROCEEDING

On November 14, 2008, Young filed this professional negligence action against the Baird Holm firm; the Govier firm, now Govier & Milone, L.L.P.; and individual members of the firms, including Dittrick and Govier. During the course of the proceeding, various other individual defendants were dismissed, and those dismissals are not at issue in this appeal.

Young alleged that the PMA and APMA were unenforceable because they were fraudulently procured by Davis, signed while she was under duress, and void as against public policy. She alleged that her attorneys, the appellees, were negligent in advising her about the PMA and APMA and in litigating issues regarding the enforceability of the agreement. She also alleged that they charged her excessive fees. She alleged that as a proximate result of their negligence, she lost the ability to appeal the enforceability of the PMA and APMA and “the ability to share in up to one-half of what [the attorneys] informed her was a \$192 Million Marital Estate.” She prayed for judgment against the appellees, jointly and severally; for monetary damages of \$100 million; and for disgorgement of attorney fees, interest, and costs. The appellees filed answers denying all claims and asking for dismissal of the action.

The appellees filed motions for summary judgment, and Young filed a cross-motion for summary judgment. The district court overruled Young’s motion, finding that there were genuine issues of material fact as to whether the appellees were negligent. However, the court granted the appellees’

motions for summary judgment in part, finding that the order approving the PMA and APMA entered in the first dissolution proceeding was binding on the court in the second dissolution proceeding under the doctrines of res judicata and judicial estoppel. The court determined that even if Young could establish negligence by the appellees, she could not prove proximate causation.

The court reserved three issues for trial: (1) whether Govier failed to convey a \$2 million settlement offer to Young, (2) whether there was a failure to submit counteroffers, and (3) whether the appellees charged excessive fees. Subsequently, the district court modified its order and granted summary judgment for the appellees on the first two of the previously preserved claims, leaving only the claim regarding excessive attorney fees for trial. Eventually, the parties reached a settlement as to the attorney fees and stipulated to the entry of a final judgment, which was entered on November 1, 2011. Young perfected this timely appeal.

## II. ASSIGNMENTS OF ERROR

Young assigns, summarized and restated, that the district court erred in (1) overruling her motion for summary judgment on the issues of negligence and proximate cause, (2) sustaining the appellees' motion for partial summary judgment based upon its determination that the PMA and APMA would have been binding on the court in the second dissolution proceeding if it had not been settled, and (3) overruling her motions for recusal of the district judge.

## III. STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.<sup>1</sup>

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<sup>1</sup> *Beveridge v. Savage*, 285 Neb. 991, 830 N.W.2d 482 (2013).

[2] A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.<sup>2</sup>

#### IV. ANALYSIS

Professional negligence actions against attorneys typically involve a “‘case within the case,’” the former being the prior lawsuit or transaction in which the attorney’s negligence is alleged to have occurred.<sup>3</sup> Here, the case within the case is the second dissolution proceeding in which Young was represented by the appellees. She contends that they negligently advised her to settle that case after the court determined that it was bound by the first court’s approval of the PMA and APMA in the first dissolution proceeding. Thus, our “case within the case” actually has within it yet another case upon which the issues in this appeal are largely focused.

[3,4] A client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney’s negligence.<sup>4</sup> In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney’s employment, (2) the attorney’s neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.<sup>5</sup> It is undisputed that a professional relationship existed between Young and the appellees. The issues in this appeal involve the elements of neglect of duty and proximate cause.

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<sup>2</sup> *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

<sup>3</sup> See *Bowers v. Dougherty*, 260 Neb. 74, 85, 615 N.W.2d 449, 457 (2000).

<sup>4</sup> *Wolski v. Wandel*, 275 Neb. 266, 746 N.W.2d 143 (2008); *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 551 N.W.2d 266 (1996).

<sup>5</sup> *Freedom Fin. Group v. Wooley*, 280 Neb. 825, 792 N.W.2d 134 (2010); *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010).

1. YOUNG'S MOTION FOR  
SUMMARY JUDGMENT

[5-7] Young argues that the district court erred in denying her motion for summary judgment and in failing to find that certain conduct by the lawyers was malpractice which proximately caused her alleged damage. In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances.<sup>6</sup> Although the general standard of an attorney's conduct is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact.<sup>7</sup> Expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith.<sup>8</sup>

[8,9] In support of her motion for summary judgment, Young presented the affidavits of attorney experts who opined that the appellees failed to meet the standard of care in advising Young to accept the settlement offer in the second dissolution proceeding. In response, the appellees submitted the affidavits of attorney experts who opined that they did not deviate from the standard of care. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.<sup>9</sup> A conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment.<sup>10</sup> Accordingly, the district court did not err in overruling Young's motion for summary judgment.

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<sup>6</sup> *Radiology Servs. v. Hall*, *supra* note 5; *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

<sup>7</sup> *Radiology Servs. v. Hall*, *supra* note 5; *Wolski v. Wandel*, *supra* note 4.

<sup>8</sup> *Wolski v. Wandel*, *supra* note 4.

<sup>9</sup> *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012); *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

<sup>10</sup> See *Schiffert v. Niobrara Valley Electric*, 250 Neb. 1, 547 N.W.2d 478 (1996).

## 2. APPELLEES' MOTIONS FOR SUMMARY JUDGMENT

[10] Young argues that the district court erred in sustaining the appellees' motions for summary judgment. This inquiry focuses on the element of proximate cause. In an action for legal malpractice, the plaintiff must establish that but for the alleged negligence of the attorney, the plaintiff would have obtained a more favorable judgment or settlement.<sup>11</sup> The district court determined that even if the appellees breached the standard of care as alleged by Young, she could not have received a more favorable settlement in the second dissolution proceeding, because the court was bound to enforce the PMA and APMA under the doctrines of res judicata and judicial estoppel.

### (a) Res Judicata

[11,12] The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.<sup>12</sup> Res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action; stated another way, judgments entered by a court without jurisdiction are void and subject to collateral attack.<sup>13</sup>

It is clear that the validity of the PMA and APMA was directly addressed in the court's order terminating the first dissolution proceeding, which included Young's claim for

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<sup>11</sup> *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

<sup>12</sup> *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011).

<sup>13</sup> *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999). See, also, *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992); *Zenker v. Zenker*, 161 Neb. 200, 72 N.W.2d 809 (1955); *Koch v. County of Dakota*, 151 Neb. 506, 38 N.W.2d 397 (1949); 50 C.J.S. *Judgments* § 931 (2009).

declaratory relief, and that the two dissolution proceedings involved the same parties. Thus, the focus of our inquiry is whether the order terminating the first dissolution proceeding was a final judgment on the merits by a court of competent jurisdiction.

[13,14] Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.<sup>14</sup> Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.<sup>15</sup> It is undisputed that the court had personal jurisdiction over the parties in the first dissolution proceeding. The disputed issue in this appeal is whether it had subject matter jurisdiction to determine the validity of the PMA and APMA.

There are two possible sources of such jurisdiction: (1) the Uniform Declaratory Judgments Act<sup>16</sup> and (2) the Nebraska statutes governing dissolution of marriage,<sup>17</sup> both of which were implicitly invoked in the amended cross-petition filed by Young in the first dissolution proceeding.

In her cross-petition filed in the first dissolution proceeding, Young requested that the district court exercise its jurisdiction under the Uniform Declaratory Judgments Act and find the PMA to be void, because it was executed at a time when she was under stress, duress, and emotional collapse and was without control of her decisionmaking abilities. She alleged that because of her mental state, she did not knowingly, intelligently, or voluntarily execute the PMA and that it was therefore null and void.

The Uniform Declaratory Judgments Act includes the following grant of subject matter jurisdiction:

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<sup>14</sup> *Abdouch v. Lopez*, 285 Neb. 718, 829 N.W.2d 662 (2013).

<sup>15</sup> *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

<sup>16</sup> See Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2008).

<sup>17</sup> See Neb. Rev. Stat. §§ 42-347 to 42-386 (Reissue 2008 & Cum. Supp. 2012).

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.<sup>18</sup>

This broad authority encompasses the power to determine a party's rights under a contract, including a claim that the contract itself is invalid. Section 25-21,150 provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In the context of domestic relations actions, we have previously held that a party was entitled to seek declaratory relief in order to determine rights under an agreement with a former husband made in contemplation of a divorce which had occurred in another state.<sup>19</sup>

As noted, Young specifically sought declaratory relief in the first dissolution proceeding when she asked the court to declare the PMA "null and void." As a court of record, the district court had subject matter jurisdiction with respect to the claim for declaratory relief.<sup>20</sup> The remaining question is whether the court actually exercised that jurisdiction.

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<sup>18</sup> § 25-21,149.

<sup>19</sup> *Dorland v. Dorland*, 175 Neb. 233, 121 N.W.2d 28 (1963), *overruled on other grounds*, *Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

<sup>20</sup> See, *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990); § 25-21,149.

While Young's claims for dissolution of her marriage and declaratory relief were pending before the court in the first dissolution proceeding, the parties entered into mediation and negotiation, which led to the reconciliation of the marriage and execution of the APMA. They then jointly asked the court to approve their settlement agreement, which included the PMA as amended by the APMA. In a written stipulation signed by both parties, they represented to the district court that they had "voluntarily, freely and clearly entered into the [PMA and APMA] without any duress or undue influence from the other party," and they acknowledged that the terms of the agreements were "fair, just and not unconscionable." Young then testified that she understood approval of the parties' settlement would resolve all issues in her claim for declaratory relief and result in its dismissal with prejudice, meaning she could not in the future assert that the PMA and APMA were unenforceable. The court specifically questioned Young and found her competent.

[15] We conclude that the court exercised its jurisdiction under the Uniform Declaratory Judgments Act to approve the PMA and APMA and that its order constituted a judgment on the merits denying Young's claim for a declaration that they were invalid. We have noted that summary judgments, judgments on a directed verdict, judgments after trial, default judgments, and consent judgments are all generally considered to be on the merits for purposes of *res judicata*.<sup>21</sup> This was essentially a consent judgment in which the court, at the request of both parties, made specific findings regarding the validity of the PMA and APMA and the competency and capacity of the parties to enter into them. The court dismissed Young's claim for declaratory relief with prejudice, just as it would have if it had found the PMA and APMA to be valid and enforceable in a contested proceeding.

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<sup>21</sup> *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994) (superseded by statute on other grounds as stated in *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012)). See Jack H. Friedenthal et al., *Civil Procedure* § 14.7 (4th ed. 2005).

Under Neb. Rev. Stat. § 25-601(1) (Reissue 2008), Young could have dismissed her declaratory judgment action *without prejudice* at any time prior to its submission to the court. Had she done so, the resulting order of dismissal would not have been a decision on the merits.<sup>22</sup> This was no doubt the reason Young's lawyer asked her on the witness stand if she understood that the court's approval of the PMA and APMA would result in dismissal of the declaratory judgment action with prejudice and that she had the option of dismissing the action "without the court approving these documents." Young testified that she understood.

In sum, the order approving the PMA and APMA in the first dissolution proceeding was a final judgment on the merits entered by a court of competent jurisdiction in an action in which Young and Davis were parties, and it was therefore binding upon them in the subsequent dissolution action under the doctrine of *res judicata*. Because the first court had subject matter jurisdiction under the Uniform Declaratory Judgments Act, we need not address whether it also had subject matter jurisdiction under the dissolution statutes. And because we conclude that the judgment had preclusive effect under the doctrine of *res judicata*, we need not address whether the doctrine of judicial estoppel applies.

#### (b) Public Policy

Young argues that the judgment approving the PMA and APMA should not be given preclusive effect, because post-marital agreements are void as against public policy in Nebraska. This argument confuses the validity of the judgment with the validity of the underlying agreements. As we have noted, the judgment in the first dissolution proceeding was entered on the merits by a court of competent jurisdiction and meets all of the other requirements of *res judicata* as to Young. She therefore cannot relitigate the issues determined by that judgment, including the enforceability and validity of the PMA and APMA. Thus, even if the PMA and APMA are

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<sup>22</sup> See *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

void as against public policy, an issue we do not decide, their void nature is inconsequential once a valid final judgment was entered approving them. No public policy considerations prevent the first judgment from having preclusive effect under the facts of this case.

### (c) Remaining Arguments

We have considered Young's remaining arguments in support of her claim that the judgment in the first dissolution proceeding should not have preclusive effect and find them to be without merit. We therefore find no error in the conclusion of the district court that the judgment in the first dissolution proceeding was entitled to preclusive effect and that therefore, the attorneys' advice that Young accept the settlement offer in the second proceeding, and thus forgo further litigation of the issue, could not have been the proximate cause of any injury or damage.

### 3. YOUNG'S MOTIONS TO RECUSE

After the first district judge assigned to this case had recused himself, Young filed a motion to recuse the judge to whom the case had been reassigned. She asserted that the second judge had presided over cases in which the appellees had appeared as attorneys. That motion was overruled. Young then filed a renewed and expanded motion to recuse, in which she alleged that the second district judge, prior to his appointment to the bench, had advocated for causes to which Young and a group she headed were opposed. That motion was overruled. Young later filed another renewed motion for recusal, asserting that the judge had shown hostility toward her in several rulings which were adverse to her position. That motion was overruled as well. Young assigns that these rulings constitute reversible error.

[16,17] Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.<sup>23</sup>

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<sup>23</sup> *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). See, also, Neb. Rev. Code of Judicial Conduct § 5-302.11(A).

In order to demonstrate that a trial judge should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.<sup>24</sup>

Young cites no authority in support of her argument that recusal is "customary and appropriate" where an attorney is a party to a case assigned to a judge before whom the attorney has previously appeared.<sup>25</sup> As the U.S. Supreme Court has stated, "'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion'" directed to a trial judge.<sup>26</sup> Nor can a judge's ordinary efforts at courtroom administration be a basis for bias or partiality.<sup>27</sup> We find nothing in the district judge's rulings in this case which would be indicative of actual bias or prejudice necessitating recusal. The fact that the judge and Young took opposite sides on public policy issues before the judge was appointed to the bench does not reflect judicial bias or prejudice in a case which has no relationship to those public policy issues. We conclude that the district court did not abuse its discretion in overruling Young's motions for recusal.

## V. CONCLUSION

For the reasons discussed, we find no reversible error and therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT and MILLER-LEMAN, JJ., not participating.

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<sup>24</sup> *In re Interest of Kendra M. et al.*, *supra* note 23.

<sup>25</sup> Brief for appellant at 42.

<sup>26</sup> *Huber v. Rohrig*, 280 Neb. 868, 875, 791 N.W.2d 590, 598 (2010) (quoting *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)).

<sup>27</sup> *Id.*

STATE OF NEBRASKA, APPELLEE, V.  
YANNICK K. YUMA, APPELLANT.  
835 N.W.2d 679

Filed July 12, 2013. No. S-12-258.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Criminal Law: Sentences: Judgments.** In a criminal case, entry of judgment occurs with the imposition of a sentence.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Reversed and remanded for further proceedings.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Yannick K. Yuma pled no contest to two misdemeanors and was sentenced to two concurrent 1-year terms of imprisonment. Because of credit for time served, he was released from custody on the same day he was sentenced. He subsequently moved to withdraw his guilty pleas, claiming his defense attorney did not properly advise him of the immigration consequences of conviction at the time he entered his pleas. The district court for Lancaster County concluded that it lacked jurisdiction to consider Yuma's motion, because he had completed his sentences and had been released from custody. Based upon our recent decision in *State v. Gonzalez*,<sup>1</sup> we reverse, and remand for further proceedings.

### BACKGROUND

Yuma was born in Zaire in 1985. He was granted asylum and immigrated to the United States in 2001. In August 2009,

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<sup>1</sup> *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013).

he was charged in the district court for Lancaster County with one count of strangulation, a Class IV felony, and one count of domestic assault in the first degree, a Class III felony. He entered pleas of not guilty on both counts.

In March 2010, the State filed an amended information pursuant to a plea agreement. It charged Yuma with one count of attempted strangulation and one count of domestic assault in the third degree, both Class I misdemeanors. Yuma pled no contest to both counts. Before accepting the pleas, the judge advised Yuma that “conviction of the offenses for which you have been charged may have the consequence of removal from the United States, or denial of naturalization pursuant to the laws of the United States.” When asked if he understood the advisement, Yuma replied in the affirmative. On April 7, Yuma was sentenced to imprisonment for 1 year on each count, with the sentences to be served concurrently. He was given credit for 247 days served. Because of the credit, Yuma was released from custody the same day he was sentenced.

In September 2011, Yuma filed a petition for writ of error coram nobis. After an evidentiary hearing on his petition but before any ruling, he obtained leave of court to amend and filed a common-law motion to withdraw his pleas and vacate his convictions. Relying upon *Padilla v. Kentucky*,<sup>2</sup> he alleged he was denied effective assistance of counsel at the time of his pleas, because his lawyer never asked about his “citizenship/immigration status” or “inform[ed] him of the deportation consequences of his . . . plea,” despite the fact that “deportation is presumptively mandatory” for noncitizens convicted of domestic assault. Yuma alleged that he was currently facing deportation as a result of his convictions and that his counsel’s ineffective assistance constituted a “[m]anifest injustice,” which entitled him to the relief he sought.

After conducting a second evidentiary hearing, the district court found that because Yuma was released from custody before seeking to withdraw his pleas, it was necessary to

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<sup>2</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

consider the jurisdictional issue of “whether a common-law Motion to Withdraw Plea is available to a defendant whose sentence has been completed.” The court examined our cases addressing the various means of collaterally attacking a plea-based conviction on the ground that the defendant was not informed or aware of immigration consequences and noted that we had not squarely addressed the jurisdictional issue presented in this case. The court concluded:

While it is possible that, once the issue is squarely before it, the Nebraska Supreme Court may conclude that having served one’s sentence is a distinction which should not make a difference in the context of a common-law Motion to Withdraw Plea, that sort of evolution in the law is properly left to the appellate courts.

The court therefore denied the motion for the reason that it lacked jurisdiction. Yuma perfected this timely appeal.

#### ASSIGNMENT OF ERROR

Yuma contends, restated, that the district court erred in concluding that it lacked jurisdiction to consider his common-law motion to withdraw his pleas and vacate his convictions.

#### STANDARD OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.<sup>3</sup>

#### ANALYSIS

As we recently noted in *Gonzalez*,<sup>4</sup> a defendant seeking to withdraw a plea of guilty or nolo contendere after his or her conviction has become final has two potential statutory remedies. The first is Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), which allows a defendant to move to withdraw a plea and vacate a conviction when the statutorily required advisement has not been given and an immigration consequence results from the conviction. The second is the Nebraska

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<sup>3</sup> *State v. Gonzalez*, *supra* note 1; *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013).

<sup>4</sup> *State v. Gonzalez*, *supra* note 1.

Postconviction Act,<sup>5</sup> under which a “prisoner in custody under sentence”<sup>6</sup> may seek to have a conviction vacated on the ground that it was obtained in violation of the prisoner’s constitutional rights.<sup>7</sup> A motion for postconviction relief must be filed within 1 year of the triggering event.<sup>8</sup>

In *Gonzalez*, we also reaffirmed the existence of a third means of withdrawing a plea after a conviction has become final, and we clarified its scope and parameters. We held:

[T]here is a Nebraska common-law procedure under which a defendant may move to withdraw a plea after his or her conviction has become final. This procedure is available only when (1) the [Nebraska Postconviction] Act is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea and (2) a constitutional right is at issue. In sum, this common-law procedure exists to safeguard a defendant’s rights in the very rare circumstance where due process principles require a forum for the vindication of a constitutional right and no other forum is provided by Nebraska law.<sup>9</sup>

In this case, Yuma was given the advisement required by § 29-1819.02. He has not sought to withdraw his plea pursuant to that statute, and has no grounds to do so. Nor has Yuma sought relief under the Nebraska Postconviction Act. Instead, he relies solely upon the common-law procedure. To decide whether he is entitled to utilize that procedure, we must first determine whether relief under the Nebraska Postconviction Act is, or ever was, available to him.

We conclude that the Nebraska Postconviction Act is not, and never was, available to Yuma. He was sentenced on April 7, 2010, but was immediately released from custody because

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<sup>5</sup> Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2008 & Cum. Supp. 2012).

<sup>6</sup> § 29-3001(1).

<sup>7</sup> § 29-3001. See, *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

<sup>8</sup> § 29-3001(4).

<sup>9</sup> *State v. Gonzalez*, *supra* note 1, 285 Neb. at 949-50, 830 N.W.2d at 511.

of his credit for time served. Because Yuma was never a “prisoner in custody under sentence,” he never could have sought relief under the act.<sup>10</sup>

The remaining question is whether there is a constitutional right at issue. Yuma, relying on *Padilla*,<sup>11</sup> asserts his Sixth Amendment constitutional right to counsel is at issue. The U.S. Supreme Court has recognized that “‘the right to counsel is the right to the effective assistance of counsel.’”<sup>12</sup> In *Padilla*, the Court stated:

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” . . . To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.<sup>13</sup>

The Court concluded *Padilla*’s allegation that his trial counsel failed to advise him that his guilty plea could lead to deportation was sufficient to state a claim of “constitutional deficiency.”<sup>14</sup> Yuma’s claim is similarly sufficient—if the holding in *Padilla* applies to this case.

In *Chaidez v. U.S.*,<sup>15</sup> the U.S. Supreme Court held that because *Padilla* announced a new rule within the meaning of *Teague v. Lane*,<sup>16</sup> those defendants whose convictions became

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<sup>10</sup> See § 29-3001(1).

<sup>11</sup> *Padilla v. Kentucky*, *supra* note 2.

<sup>12</sup> *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

<sup>13</sup> *Padilla v. Kentucky*, *supra* note 2, 559 U.S. at 374 (quoting *McMann v. Richardson*, *supra* note 12).

<sup>14</sup> *Id.*, 559 U.S. at 369.

<sup>15</sup> *Chaidez v. U.S.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

<sup>16</sup> *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

final prior to *Padilla* could not benefit from its holding. But in *Griffith v. Kentucky*,<sup>17</sup> the Court held that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” Pursuant to *Griffith*, we applied newly announced constitutional rules to cases pending on direct appeal in *State v. Mata*<sup>18</sup> and *State v. Gales*.<sup>19</sup> Both of those cases were pending on direct appeal when the Court announced a new rule in *Ring v. Arizona*.<sup>20</sup>

[2] We conclude that the holding of *Padilla* is applicable to Yuma. Yuma entered his pleas on March 9, 2010, before *Padilla* was decided, but he was not sentenced until April 7, 2010, approximately 1 week after the *Padilla* decision. In a criminal case, entry of judgment occurs with the imposition of a sentence.<sup>21</sup> Thus, although Yuma’s case was not pending on appeal when *Padilla* was decided, his convictions were not final at the time, and therefore, the new rule announced in *Padilla* applies to him.

In sum, the district court has jurisdiction to decide Yuma’s common-law motion to withdraw his pleas, because the statutory remedy under § 29-1819.02 does not apply and the motion asserts a constitutional issue which was not, and never could have been, addressed under the Nebraska Postconviction Act. The fact that Yuma has served his sentences is not relevant to the jurisdictional analysis. On remand, the district court must determine whether Yuma’s motion to withdraw is timely and whether he has established by clear and convincing evidence that withdrawal of his pleas is necessary to correct a manifest injustice.

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<sup>17</sup> *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).

<sup>18</sup> *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds*, *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

<sup>19</sup> *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

<sup>20</sup> *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

<sup>21</sup> *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

## CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR  
FURTHER PROCEEDINGS.

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IN RE INTEREST OF JUSTINE J. ET AL.,  
CHILDREN UNDER 18 YEARS OF AGE.  
STATE OF NEBRASKA, APPELLEE, V.  
SHAWNA R., APPELLANT.  
835 N.W.2d 674

Filed July 12, 2013. No. S-12-1134.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile at the adjudication stage, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 2008).
3. **Juvenile Courts: Jurisdiction: Parental Rights.** Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) outlines the basis for the juvenile court's jurisdiction and grants exclusive jurisdiction over any juvenile who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian.
4. **Parental Rights.** The purpose of the adjudication phase is to protect the interests of the child.
5. **Juvenile Courts: Jurisdiction: Proof.** The Nebraska Juvenile Code does not require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction. While the State need not prove that the child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm.
6. **Parental Rights: Proof.** The State must prove the allegations in a petition for adjudication filed under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by a preponderance of the evidence.

Appeal from the Separate Juvenile Court of Douglas County:  
ELIZABETH CRNKOVICH, Judge. Affirmed in part, and in part  
reversed and remanded with directions.

Cassidy V. Chapman and Andrea M. Smith for appellant.

Donald W. Kleine, Douglas County Attorney, Ann C. Miller, and Emily H. Anderson, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

McCORMACK, J.

### NATURE OF CASE

Shawna R. appeals from an order of the juvenile court adjudicating her four children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Shawna does not challenge the adjudication of her two daughters, Sylissa J. and Justine J. Shawna challenges the juvenile court's adjudication of her two sons, Moses S. and Elijah S., and argues that there was no evidence that the boys were in danger of future harm. We agree and find that there was insufficient evidence adduced by the State to support the adjudication of Moses and Elijah. Therefore, we reverse the judgment of the juvenile court pertaining to Moses and Elijah and remand the cause with directions to dismiss the petition for adjudication of Moses and Elijah.

### BACKGROUND

Shawna is the biological mother of four children. At the time of the adjudication hearing, her daughter Sylissa was 14 years old, daughter Justine was 11 years old, son Moses was 8 years old, and son Elijah was 6 years old. At the relevant times of neglect and abuse, the two oldest children, Sylissa and Justine, lived with their mother, Shawna, and her husband, Jarrod R. The record indicates that the two youngest children, Moses and Elijah, lived with their grandparents.

On April 12, 2012, the State filed a petition alleging that Sylissa and Justine came within the meaning of § 43-247(3)(a) and lacked proper parental care by reason of the faults and habits of Shawna and Jarrod. The State made five allegations: (1) Shawna's and Jarrod's use of alcohol and controlled substances places said children at risk of harm; (2) Shawna

and Jarrod have engaged in multiple instances of domestic violence; (3) Shawna and Jarrod have failed to provide said children with proper parental care, support, and supervision; (4) Shawna and Jarrod have failed to provide safe, stable, and appropriate housing for said children; and (5) due to the above allegations, said children are at risk for harm.

On April 16, 2012, the State filed an amended petition. The amended petition added Moses and Elijah and alleged the two boys also came within the meaning of § 43-247(3)(a) for the same reasoning as Sylissa and Justine.

During the adjudication hearing on October 11, 2012, the State offered, and the court admitted into evidence, depositions from Sylissa and Justine. Both Sylissa and Justine testified to finding drug paraphernalia, including pipes and needles, in the house. They witnessed multiple instances of domestic violence between Shawna and Jarrod. They were often left unsupervised without enough food to eat and having to fend for themselves when it came to finding dinner. In their depositions, both daughters testified that they did not feel safe living with Shawna and Jarrod.

Sylissa and Justine both testified that at the times of the above incidences of neglect, their brothers, Moses and Elijah, were not present. Sylissa testified that Moses and Elijah lived at their grandparents' house and not with Shawna and Jarrod. Additionally, both Sylissa and Justine testified that they felt safe when staying with their grandparents.

On October 22, 2012, the juvenile court found by a preponderance of the evidence that Sylissa, Justine, Moses, and Elijah were within § 43-247(3)(a) due to the faults and habits of Shawna and Jarrod. The children were ordered to remain in the temporary custody of the Nebraska Department of Health and Human Services for appropriate care and placement. Shawna appeals that order.

### ASSIGNMENTS OF ERROR

Shawna assigns, restated and summarized, that the juvenile court erred in finding by a preponderance of the evidence that Moses and Elijah come within the meaning of § 43-247(3)(a) and in finding that Moses and Elijah should remain in the

temporary custody of the Department of Health and Human Services for appropriate care and placement.

### STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.<sup>1</sup>

### ANALYSIS

Shawna does not contest the juvenile court's findings that Syllissa and Justine were at risk of harm under § 43-247(3)(a) due to her faults and habits. However, she argues that because Moses and Elijah were not residing with her, they were not at a risk of harm and did not fall within the meaning of § 43-247(3)(a).

[2,3] To obtain jurisdiction over a juvenile at the adjudication stage, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.<sup>2</sup> Section 43-247(3)(a) outlines the basis for the juvenile court's jurisdiction and grants exclusive jurisdiction over any juvenile "who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian."

[4-6] The purpose of the adjudication phase is to protect the interests of the child.<sup>3</sup> The Nebraska Juvenile Code does not require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction.<sup>4</sup> While the State need not prove that the child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention,

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<sup>1</sup> *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013).

<sup>2</sup> See *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001).

<sup>3</sup> See *id.*

<sup>4</sup> *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992).

there is a definite risk of future harm.<sup>5</sup> The State must prove such allegations by a preponderance of the evidence.<sup>6</sup>

The issue presented by this appeal is whether the State proved by a preponderance of the evidence that without intervention, there was definite risk of future harm to Moses and Elijah, by reason of the fault or habits of Shawna and Jarrod, while the boys were living with their grandparents. We find that the State failed to meet its burden.

In *In re Interest of Carrdale H.*,<sup>7</sup> the juvenile court adjudicated a child based upon the father's possession of illegal drugs, and the Nebraska Court of Appeals reversed the adjudication order. The court noted that the State failed to adduce any evidence regarding whether the father was charged with a crime, whether the father had any history of drug use in or out of the child's presence, whether the child was present when the father possessed the drugs, or whether the child was affected in any way by the father's actions.<sup>8</sup> The court held that the State failed to prove by a preponderance of the evidence the petition's allegation that the father's use of drugs placed said child at risk for harm.<sup>9</sup>

In *In re Interest of Brianna B. & Shelby B.*,<sup>10</sup> the juvenile court adjudicated the children because of a pattern of alcohol use by the parents. The Court of Appeals concluded that the State failed to adduce evidence to show that the children lacked proper parental care.<sup>11</sup> Although there was evidence that the parents had consumed alcohol in the presence of the children, there was no evidence to show that the children were impacted by the drinking.<sup>12</sup>

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<sup>5</sup> *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

<sup>6</sup> See *id.*

<sup>7</sup> *In re Interest of Carrdale H.*, 18 Neb. App. 350, 781 N.W.2d 622 (2010).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

And finally, in *In re Interest of Taeven Z.*,<sup>13</sup> the juvenile court adjudicated the child because the mother had ingested a morphine pill that was not prescribed to her. The Court of Appeals found that there was no evidence that the child was affected by the mother's taking the nonprescribed pill or any evidence that the mother's taking the pill placed the child at risk.<sup>14</sup> The court held that there was no evidentiary nexus between the consumption of drugs by the mother and any definite risk of future harm to the child.<sup>15</sup>

Like the aforementioned cases, we conclude that the State did not adduce sufficient evidence to support the adjudication of Moses and Elijah. It is uncontested that the State met its burden as to the adjudication of Sylissa and Justine. However, there is no evidence that Moses and Elijah were present for Shawna's and Jarrod's drug use or domestic violence. In fact, the deposition testimony of both Sylissa and Justine indicates that Moses and Elijah were living with their grandparents. Sylissa's and Justine's testimony establishes that their grandparents provided a safe environment for Moses and Elijah. Therefore, although the living situation provided by Shawna and Jarrod to Sylissa and Justine was sufficient to adjudicate the children, the State failed to prove by a preponderance of the evidence an evidentiary nexus between the neglect suffered by Sylissa and Justine and any definite risk of future harm to Moses and Elijah.

Therefore, we reverse the juvenile court's adjudication of Moses and Elijah. We do so cautiously and note that should evidence be discovered that Moses and Elijah are at a definite risk of future harm after being returned to the custody of Shawna, the State should again petition the juvenile court for adjudication pursuant to § 43-247(3)(a).

### CONCLUSION

Because we find there was insufficient evidence presented to warrant an adjudication of Moses and Elijah, we reverse the

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<sup>13</sup> *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

adjudication order concerning Moses and Elijah and remand the cause with directions to dismiss the petition as to Moses and Elijah. As conceded by the parties, we affirm the adjudication order of the juvenile court as to Sylissa and Justine.

AFFIRMED IN PART, AND IN PART REVERSED  
AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, v.  
ERIC O. ROCHA, SR., APPELLANT.

836 N.W.2d 774

Filed July 19, 2013. No. S-12-411.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
2. \_\_\_\_: \_\_\_\_\_. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
3. \_\_\_\_: \_\_\_\_\_. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Appeal and Error.** Absent plain error, an appellate court ordinarily will not address an issue that was not raised in the trial court.
5. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** Ineffective assistance of counsel claims are generally addressed through a post-conviction action. This is frequently because the record is insufficient to review the issue on direct appeal.
6. **Effectiveness of Counsel: Postconviction.** Where no plausible explanation for an attorney's actions exists, to require the defendant to file a postconviction action can only be a waste of judicial time.
7. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
8. \_\_\_\_: \_\_\_\_\_. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
9. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

10. **Effectiveness of Counsel: Appeal and Error.** In addressing the “prejudice” component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court focuses on whether a trial counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
11. **Trial: Joinder.** Offenses are properly joinable under Neb. Rev. Stat. § 29-2002(1) (Reissue 2008) if they are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
12. \_\_\_\_: \_\_\_\_\_. Charges arise out of the same act or transaction if they are so closely linked in time, place, and circumstance that a complete account of one charge cannot be related without relating details of the other charge.
13. **Trial: Joinder: Evidence.** To be part of the same act or transaction, there must be substantially the same facts; i.e., one charge cannot be proved without presenting evidence of the other charge.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Reversed, sentences vacated, and cause remanded for further proceedings.

James R. Mowbray and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

WRIGHT, CONNOLLY, STEPHAN, MILLER-LERMAN, and CASSEL, JJ., and RIEDMANN, Judge.

PER CURIAM.

## I. NATURE OF CASE

Eric O. Rocha, Sr., was convicted of first degree sexual assault of a child and four counts of child abuse. In this direct appeal, Rocha claims trial counsel was ineffective in failing to move to sever the sexual assault charge from the child abuse charges and in failing to request an instruction limiting the jury’s consideration of the evidence of one crime to that particular crime. He also alleges trial error in failing to instruct the jury on the lesser-included offense of negligent child abuse and in failing to instruct the jury on the defense of parental justification of use of force. For the reasons set forth, we reverse the

judgments of conviction, vacate the sentences, and remand the cause for further proceedings.

## II. FACTS

On March 8, 2011, an officer with the Nebraska State Patrol conducted an interview of J.S., a young girl, who was 8 years old at the time of trial. After the interview, the officer obtained a search warrant for Rocha's residence in Scottsbluff, Nebraska. At the residence, a slipper and a belt were retrieved and photographs were taken of the residence, including a photograph of a bedroom door which could be locked from the outside of the room.

Rocha was charged with one count of first degree sexual assault of a child and four counts of felony child abuse. J.S. was the alleged victim of the sexual assault and one of the alleged victims of child abuse. Her three brothers, J.C., A.R., and A.S., were the other alleged child abuse victims. A second amended information alleged that Rocha committed sexual assault from October 14, 2009, through February 2011 and that Rocha committed child abuse from June 11, 2008, through February 2011.

At trial, the evidence showed that Rocha and Jessica S. were married and lived together. J.S., J.C., A.R., and A.S. are Jessica's children, but Rocha is not their biological father. He supervised the children while Jessica was at work and the children were at home.

J.S. testified that during the evenings, Rocha came into her bedroom, which she shared with her brothers. He took her into the living room and forced her to perform oral sex. She gave her story as to what occurred during the assaults. The assaults allegedly occurred in the living room, in her mother's bedroom, in the bathrooms, and in the car.

In the car, Rocha allegedly made J.S. sit on his lap with her pants and underwear partially off. Rocha's "private area" went "in [her] bottom," and she said that hurt. Rocha also allegedly touched her vaginal area with his finger.

J.S. claimed Rocha hit her with a slipper on her arm. She claimed Rocha hit her bottom with a belt, which hurt. Rocha also blew marijuana smoke into her mouth. She said she did

not get enough to eat at dinner because the children did not get “seconds.” She said that on one occasion, Rocha made her drink beer and then made her perform oral sex.

J.S. was afraid of Rocha because he hurt her brothers. She said Rocha choked A.R. by “dragging him up in the wall” with his hands around his throat. She also saw Rocha push his fingernail into A.R.’s ear. Rocha spanked A.R. and A.S. with the belt and the slipper. And J.S. saw Rocha choke A.S. in the bathroom.

J.C. explained that the bedroom he shared with J.S., A.R., and A.S. locked from the outside and that sometimes the boys were locked in the bedroom while J.S. was in the living room with Rocha. J.C. testified he did not always get enough food to eat. He saw Rocha smoke something green in color, and the smoke hurt the boys’ eyes.

Rocha did not hit J.C., but J.C. saw Rocha hit the other children. Rocha spanked J.S. with his hand, sometimes with her pants down. Rocha spanked A.R.’s bottom with his hand or with a sandal. Rocha also hit A.R.’s bottom and hands with a wooden stick and hit A.R.’s bottom with the tube of a vacuum cleaner. He made A.R. stand in a corner, and one time, J.C. saw Rocha push A.R.’s head into the wall, giving A.R. a bloody nose. On another occasion, Rocha threw A.R. across the kitchen floor. He “thump[ed]” A.R. on the head with his finger or a wooden spoon. Rocha hit A.R. on his side if he was not behaving. J.C. testified that Rocha spanked A.S. with his hand, but never used anything else to hit A.S.

J.S.’ kindergarten teacher testified that until November 2009, J.S. was a “bubbly” 5-year-old, who then became very agitated and nervous, cried a lot, and did not want to go home. J.S. refused to take an art project home. The teacher explained that J.S. wanted to be perfect in doing everything at school and would erase her papers repeatedly. When coloring, J.S. was afraid to go outside the lines. She would cry at school because she was hungry or afraid to go home. The teacher gave J.S. and the other students in the class snacks twice a day to address J.S.’ hunger. J.S. was frightened and uneasy when she talked with the teacher about her home. She was afraid to go home if her new shoes were dirty, so she

“spit clean[ed]” them. After the teacher observed this behavior, she helped J.S. clean her shoes with a rag, and did so regularly after J.S. sobbed for fear she would get in trouble at home.

J.S.’ kindergarten teacher said that toward the end of November 2009, J.S. used the bathroom 15 or 20 times each day to wash her hands, arms, legs, hair, and face. The teacher testified that this behavior was different for J.S. and unusual for any kindergarten student. J.S.’ first grade teacher during the 2010-11 school year also testified to similar behavior.

A licensed medical health practitioner and certified professional counselor, Jeanna Townsend, provided therapy to J.S. 5 times in February 2010 and approximately 14 times beginning in June 2011. During her five sessions with J.S. in 2010, J.S. did not answer questions and “shut down.” Townsend testified that child victims of sexual abuse exhibit certain behaviors. These include taking responsibility for many things and feeling that they are bad or dirty. Townsend stated that constant washing of body parts was consistent with sexual abuse because the child tends to feel dirty. Excessive use of the bathroom was consistent with sexual abuse. Townsend testified to other activities that could be consistent with sexual abuse.

The children’s mother, Jessica, testified Rocha disciplined the children by sending them to their room, giving them a “time out,” or not letting them go outside to play. She did not see any marks or bruises on the children that caused concern that the children were improperly disciplined, and she did not see Rocha hit A.R. or A.S. on the head with a wooden spoon during mealtime. She did not hear any complaints from the children that Rocha spanked or treated them inappropriately; hit them with a belt, stick, or sandal; or choked them. But Jessica admitted she found little bruises on the children after Rocha had been alone with them and stated she had concerns about how Rocha treated the children.

Jessica did not expose J.S. to anything sexual, and Jessica claimed J.S. did not tell her that she was sexually abused by Rocha. She said J.S. had an imagination and made up stories. Jessica said she did not see Rocha smoke marijuana in the

home and did not find or smell marijuana in the home. She denied that the children were deprived of food at dinner.

Rocha denied the allegations of sexual assault and child abuse. He denied taking J.S. to the living room or exposing himself to her. He denied having done anything to J.S. for sexual gratification.

Rocha said he disciplined J.S., A.R., and A.S. by scolding them, yelling at them, giving them “timeouts,” and sending them to their room. He said he spanked them with an open hand on the bottom but denied pinching, choking, hitting them in the face, or striking them with anything other than his hands. Rocha disciplined J.C. by “grounding” him. He denied using marijuana in front of the children, offering it to the children, or forcing them to consume it. He said that he and Jessica made them meals and that the children were not denied food.

After the evidentiary portion of the trial, Rocha’s counsel requested that a proposed jury instruction on the term “cruel punishment” be given to the jury. The court denied the instruction. It determined the instruction was not necessary to accurately state the law. During its rebuttal argument, the State asserted that J.S. had been “absolutely honest in everything she told [the jury] that happened.”

The jury found Rocha guilty on all counts. He was sentenced to prison for 40 years to life on the sexual assault conviction, with credit for 264 days served, and 3 to 5 years on each child abuse conviction. All sentences were to run consecutively. He appealed. This court has a statutory obligation to hear all appeals in cases in which the sentence of life imprisonment is imposed.<sup>1</sup>

### III. ASSIGNMENTS OF ERROR

Rocha assigns, summarized and restated, that (1) his trial counsel was ineffective in failing to move to sever the sexual assault charge from the child abuse charges, (2) his trial counsel was ineffective in failing to request a limiting instruction preventing the jury from considering the evidence of sexual

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<sup>1</sup> See Neb. Rev. Stat. § 24-1106(1) (Reissue 2008).

assault to convict him of the child abuse charges and vice versa, (3) the trial court erred in failing to instruct the jury on the lesser-included offense of negligent child abuse, and (4) the trial court erred in failing to instruct the jury on the parental justification for use of force as set forth in Neb. Rev. Stat. § 28-1413 (Reissue 2008). Rocha raises a hearsay claim and other ineffective assistance of counsel claims which are not necessary for our analysis.

#### IV. STANDARD OF REVIEW

[1-3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.<sup>2</sup> When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.<sup>3</sup> With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,<sup>4</sup> an appellate court reviews such legal determinations independently of the lower court's decision.<sup>5</sup>

#### IV. ANALYSIS

##### 1. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO SEVER SEXUAL ASSAULT CHARGE FROM CHILD ABUSE CHARGES

[4] Rocha first takes issue with his charges being joined in a single trial. Rocha did not object to the alleged misjoinder and did not move to sever one or several of the charges. Absent plain error, we ordinarily will not address an issue that was not raised in the trial court.<sup>6</sup> Other courts have held that a trial court may raise the issue of misjoinder and sever joint charges

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<sup>2</sup> *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

<sup>3</sup> *Id.*

<sup>4</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>5</sup> *State v. Poe*, *supra* note 2.

<sup>6</sup> See, e.g., *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

or defendants on its own motion.<sup>7</sup> But a court's failure to exercise that power is reviewable only for plain error.<sup>8</sup> Rocha has not argued plain error here.

However, the alleged misjoinder and failure to sever may also be addressed through the prism of ineffective assistance of counsel, which is what Rocha has done here. He argues that his counsel was ineffective in failing to object to the misjoinder of his charges and in failing to move to sever the charges. He argues that his counsel's inaction resulted in a fundamentally unfair trial and that his convictions must be reversed. We can conceive of no strategic reason for his counsel's failure to act, and that failure undermines our confidence in the outcome of the trial.

(a) Addressing Ineffective Assistance of  
Counsel Claim on Direct Appeal

[5] Obviously, this is Rocha's direct appeal, and ineffective assistance of counsel claims are generally addressed through a postconviction action. This is frequently because the record is insufficient to review the issue on direct appeal.<sup>9</sup> There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.<sup>10</sup> But where the record on direct appeal rebuts that presumption, we may address the issue. Essentially, that presumption is rebutted when counsel's decision cannot be justified as a part of any plausible trial strategy.<sup>11</sup> As will be discussed more fully below, such is the case here.

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<sup>7</sup> See, e.g., *U.S. v. McManus*, 23 F.3d 878 (4th Cir. 1994); *United States v. De Diego*, 511 F.2d 818 (D.C. Cir. 1975); 5 Wayne R. LaFave et al., *Criminal Procedure* § 17.3(a) (2007).

<sup>8</sup> See, e.g., *U.S. v. Hart*, 273 F.3d 363 (3d Cir. 2001); *U.S. v. Iiland*, 254 F.3d 1264 (10th Cir. 2001); *United States v. Palow*, 777 F.2d 52 (1st Cir. 1985).

<sup>9</sup> See, e.g., *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). See, also, *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

<sup>10</sup> See, e.g., *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

<sup>11</sup> See *Faust*, *supra* note 9.

The dissent, however, takes issue with our addressing Rocha's ineffective assistance claim on direct appeal and suggests that we should never resolve such claims on direct appeal. In support of its position, the dissent makes several arguments, most of which find support in the U.S. Supreme Court's opinion in *Massaro v. United States*<sup>12</sup>; the dissent quotes *Massaro* extensively. But in the final paragraph of *Massaro*, the Court stated:

We do not go this far. We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffective-ness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*.<sup>13</sup>

Clearly, the U.S. Supreme Court disagreed with the dissent's categorical approach. We do too.

The dissent also poses a litany of questions that, in its view, might (on postconviction review) uncover a reasonable strategy behind trial counsel's failure to sever the charges. Putting aside whether the dissent's possible answers are actually probable or convincing, this "what if" routine could be done for any case on direct appeal. It is just another way for the dissent to argue that ineffective assistance claims should always be reserved for postconviction review. As noted above, we (and the U.S. Supreme Court) reject that position. Here, ineffective assistance is plain from the record and may be addressed on direct appeal. In fact, if appellate counsel is different from trial counsel, claims of ineffective assistance of counsel must be raised on direct appeal, or they are waived. The question is whether the record is sufficient to address the claim. In this case, the majority has determined the record is sufficient to address the claim.

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<sup>12</sup> *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003).

<sup>13</sup> *Id.*, 538 U.S. at 508.

[6] As the analysis will show, the charges were improperly joined together, and considering the obvious risks to Rocha of proceeding with a joint trial on the charges, we can conceive of no justifiable reason for counsel's failure to object to the misjoinder and failure to move to sever. "[W]here no plausible explanation for an attorney's actions exists, to require the defendant to file a postconviction action can be only a waste of judicial time."<sup>14</sup>

The State and the dissent argue that a reasonable explanation could exist and that we should wait to address this claim until it is on postconviction review. As stated above, we disagree. But as an example of such an alleged explanation, the State claimed at oral argument that perhaps Rocha's counsel did not object to the joinder of the charges and move to sever because Rocha himself requested a single trial. We find this hypothetical unpersuasive because, regardless, the decision whether to object to the joinder and move to sever was a tactical decision for trial counsel to make rather than Rocha.<sup>15</sup>

#### (b) Merits of Rocha's Ineffective Assistance of Counsel Claim

[7,8] To prevail on a claim of ineffective assistance of counsel under *Strickland*,<sup>16</sup> the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.<sup>17</sup> To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.<sup>18</sup>

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<sup>14</sup> *Faust*, *supra* note 9, 265 Neb. at 876, 660 N.W.2d at 872. See, also, *Hills v. State*, 78 So. 3d 648 (Fla. App. 2012); *People v. Karraker*, 261 Ill. App. 3d 942, 633 N.E.2d 1250, 199 Ill. Dec. 259 (1994).

<sup>15</sup> See, e.g., *State v. Fleury*, 135 Conn. App. 720, 42 A.3d 499 (2012); *Com. v. Hernandez*, 63 Mass. App. 426, 826 N.E.2d 753 (2005); *Com. v. Clarke*, 44 Mass. App. 502, 692 N.E.2d 85 (1998). See, also, Neb. Ct. R. of Prof. Cond. § 3-501.2.

<sup>16</sup> *Strickland*, *supra* note 4.

<sup>17</sup> *Watt*, *supra* note 9.

<sup>18</sup> *Id.*

[9,10] The petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.<sup>19</sup> A reasonable probability is a probability sufficient to undermine confidence in the outcome.<sup>20</sup> In addressing the "prejudice" component of the *Strickland* test, we focus on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.<sup>21</sup>

[11] Here, whether counsel's performance was deficient initially depends on whether the charges were properly joined under Neb. Rev. Stat. § 29-2002(1) (Reissue 2008). Section 29-2002 states in relevant part:

(1) Two or more offenses may be charged in the same . . . information . . . in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The language of § 29-2002(1) is similar to the language found in Fed. R. Crim. P. 8(a). Offenses are properly joinable under § 29-2002(1) if they are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.<sup>22</sup>

At the outset, the exact charges in this case should be made clear. The State charged Rocha with first degree sexual assault of a child (as to J.S. only) under Neb. Rev. Stat. § 28-319.01 (Cum. Supp. 2012). The State also charged Rocha with four counts of child abuse (as to all four children, including J.S.) under Neb. Rev. Stat. § 28-707 (Reissue 2008). Rocha argues now on appeal that his trial counsel was ineffective for failing to object to the misjoinder of these charges and for failing to

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<sup>19</sup> *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., *Strickland*, *supra* note 4; *Peralta v. U.S.*, 597 F.3d 74 (1st Cir. 2010); *Nguyen v. U.S.*, 487 Fed. Appx. 484 (11th Cir. 2012); *Henington v. State*, 2012 Ark. 181, 403 S.W.3d 55 (2012).

<sup>22</sup> See *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009).

move to sever these charges. Specifically, Rocha argues that the sexual assault charge should not have been tried with the four child abuse charges. We agree.

First, we conclude that the sexual assault charge and the child abuse charges were not of the same or similar character. For one thing, they are different crimes. Most notably, however, sexual assault, on its face, is sexual in nature, whereas child abuse is not. The sexual assault charge pertained only to J.S. and took place over a different period of time than the child abuse charges. As such, the sexual assault charge and the child abuse charges were not of the same or similar character.

[12,13] Second, the sexual assault charge was not based on the same act or transaction as the child abuse charges. Charges arise out of the same act or transaction if they are so closely linked in time, place, and circumstance that a complete account of one charge cannot be related without relating details of the other charge.<sup>23</sup> To be part of the same act or transaction, there must be substantially the same facts; i.e., one charge cannot be proved without presenting evidence of the other charge.<sup>24</sup> The fact that multiple crimes were allegedly committed about the same time or overlapped is not enough.<sup>25</sup>

Here, the alleged sexual assaults occurred separately and apart from the alleged child abuse. As noted above, J.S. was allegedly assaulted when the other children were not present. The alleged incidents occurred in the living room, Jessica's bedroom, the bathrooms, or the car. J.S. was the only child who was sexually assaulted and the only child who testified to being sexually assaulted. There was no evidence that the other children were sexually assaulted.

In contrast, many of the alleged incidents of child abuse occurred in the presence of more than one child and related to the striking of the children with a slipper, belt, or Rocha's

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<sup>23</sup> *State v. Clark*, 228 Neb. 599, 423 N.W.2d 471 (1988) (quoting *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982)).

<sup>24</sup> See, *Clark*, *supra* note 23; *Brehmer*, *supra* note 23; *State v. Dandridge*, 1 Neb. App. 786, 511 N.W.2d 527 (1993).

<sup>25</sup> See *Brehmer*, *supra* note 23.

hand. Rocha allegedly choked two of the children with his hands. Evidence of the child abuse did not require evidence of the sexual assaults, and vice versa. The charges were not part of the same act or transaction.

Finally, the sexual assault charge and the child abuse charges were not connected together or parts of a common scheme or plan. The State argues otherwise, on the basis that each of the alleged crimes was part of a common scheme or plan to exercise control over the children. We find this unpersuasive—Rocha already controlled the children by virtue of being a stepparent. And the record does not demonstrate any other inferable common scheme or plan.

Furthermore, these charges are unlike charges in cases that we have found sufficiently related under the “connected together” or “parts of a common scheme or plan” provision of § 29-2002(1). For example, in *State v. Hilding*,<sup>26</sup> we allowed the joinder of sexual assault charges and a stalking charge because the telephone calls which formed the stalking charge included, as a “frequent topic,” the alleged sexual assaults. And the defendant “admitted that the threats he made in the calls were a response to [the victim’s] allegations that he had sexually assaulted her.”<sup>27</sup> Such evidence would have been admissible in separate trials of the crimes and formed a series of connected transactions.<sup>28</sup> There is no such nexus between the alleged sexual assault and the alleged child abuse in Rocha’s case.

In sum, the sexual assault charge was misjoined with the child abuse charges. Under § 29-2002(1), the charges were not of the same or similar character, part of the same act or transaction, or connected together or parts of a common scheme or plan. As such, the charges were misjoined, and had a proper objection been raised by trial counsel, the court would have been required to order separate trials.<sup>29</sup> That being the case,

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<sup>26</sup> *Hilding*, *supra* note 22, 278 Neb. at 131, 769 N.W.2d at 339.

<sup>27</sup> *Id.*

<sup>28</sup> See *Hilding*, *supra* note 22.

<sup>29</sup> See, e.g., *U.S. v. Chavis*, 296 F.3d 450 (6th Cir. 2002); 5 LaFave et al., *supra* note 7, § 17.3(b).

and because of the obvious risks to Rocha of proceeding with a joint trial on the charges, we can conceive of no reasonable strategic reason for counsel's failure to object and move to sever the charges. This was deficient performance.

The question remains whether counsel's deficient performance actually prejudiced Rocha. In answering that question, and as stated previously, we focus on whether a trial counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. To show prejudice, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.<sup>30</sup> A reasonable probability is a probability sufficient to undermine confidence in the outcome.<sup>31</sup>

Because the charges were misjoined under § 29-2002(1), evidence of both the alleged sexual assaults and the child abuse of the other children was admitted in the joint trial. But had the charges been tried separately, evidence of the child abuse regarding the other children would have been inadmissible in a trial on the sexual assault charge, and vice versa, under Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The reason for the rule is that such evidence, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.<sup>32</sup> That risk is a substantial one.<sup>33</sup>

We do not agree with the State's claim that § 27-404(2) would be inapplicable in separate trials, because the evidence

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<sup>30</sup> *Robinson*, *supra* note 19.

<sup>31</sup> *Id.*

<sup>32</sup> See *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

<sup>33</sup> See *Faust*, *supra* note 9.

of the child abuse charges and of the sexual assault charge was inextricably intertwined.<sup>34</sup> Here, there was no evidence that Rocha sexually assaulted the boys. The boys were not present when the alleged sexual assaults occurred. The State did not need to present evidence that Rocha abused the children to tell the entire story of sexual assault, and it did not need to present evidence of sexual assault to tell the entire story of child abuse.

Trying the sexual assault and child abuse charges together also essentially prohibited Rocha from moving to exclude prejudicial evidence based on Neb. Rev. Stat. § 27-403 (Reissue 2008), which states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” In a separate trial for child abuse, any probative value of the sexual assault evidence would be outweighed by unfair prejudice; the jury might convict Rocha of child abuse because he had sexually assaulted J.S. Similarly, in a separate trial for sexual assault, any probative value of child abuse evidence would be outweighed by unfair prejudice; the jury might convict Rocha of sexual assault because he abused the children.

The risk of undue prejudice, considering the type of evidence at issue, was high; evidence of sexual assault, by its nature, was highly volatile and had the potential to fan the jury’s emotions. That risk was exacerbated by the fact that the court did not specifically instruct the jury on the importance of keeping the charges, and evidence related to those charges, separate during its deliberations. For these reasons, our confidence in the outcome of this case is undermined and we conclude that Rocha was prejudiced by his trial counsel’s deficient performance.

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<sup>34</sup> See *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

## 2. FAILURE TO REQUEST LIMITING INSTRUCTIONS

Rocha claims trial counsel was ineffective because he failed to request a limiting instruction that the jury could not consider the evidence of sexual assault to prove the charges of child abuse and vice versa.

At oral argument, the State asserted hypothetically that an evidentiary hearing was required to examine counsel's strategy, because Rocha may have insisted on testifying, but in only one trial. Assuming for purposes of the State's assertion that an evidentiary hearing was required, the question remains whether the record is sufficient to address counsel's failure to request limiting instructions. We conclude that it is.

In reviewing the admissibility of other crimes evidence under § 27-404(2), an appellate court considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith, (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.<sup>35</sup>

The charges were not of the same or similar character, were not based on the same act, and were not part of a common scheme or plan. The evidence of Rocha's sexual assaults was not relevant to the charges of child abuse and vice versa.

Evidence that Rocha made J.S. perform oral sex and that Rocha put his "private area in [her] bottom" would not be relevant for any proper purpose under § 27-404 as to the child abuse charges. Nor would evidence that Rocha spanked the children or allegedly physically abused the children be relevant to the sexual assault charges. The admission of this evidence without limiting instructions was unfairly prejudicial.

Once the charges were joined, an attorney with ordinary training and skill in criminal law would have requested these limiting instructions. We can conceive of no reasonable

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<sup>35</sup> *Glazebrook, supra* note 32.

explanation why, if Rocha insisted on trying the charges in one trial, counsel would not ask for the limiting instructions.

For the reasons stated above, we conclude that Rocha received ineffective assistance of counsel. We therefore reverse the judgments of conviction.

### 3. SUFFICIENCY OF EVIDENCE

Because we reverse the judgments of conviction, we examine whether the evidence admitted by the trial court was sufficient to sustain Rocha's convictions. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.<sup>36</sup> The evidence was sufficient to sustain the guilty verdicts.

## VI. CONCLUSION

For the reasons set forth herein, we reverse the judgments of conviction, vacate the sentences, and remand the cause for further proceedings.

REVERSED, SENTENCES VACATED, AND CAUSE  
REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.  
HEAVICAN, C.J., not participating.

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<sup>36</sup> See *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

STEPHAN, J., dissenting.

This is the second time that this court has overturned a criminal conviction on the ground of ineffective assistance of counsel without a complete factual record to support its conclusion. As in the first instance,<sup>1</sup> I respectfully dissent.

As the majority acknowledges in its statement of the standard of review, a claim of ineffective assistance of counsel presents a mixed question of law and fact, requiring that we review factual findings of the lower court for clear error, but reach an independent determination of whether ineffective

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<sup>1</sup> *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003) (Stephan, J., dissenting), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

assistance of counsel under the *Strickland v. Washington*<sup>2</sup> standard has been proved.<sup>3</sup> Here, we have no “factual findings of the lower court” to review on the issue of defense counsel’s performance, because that issue was never tried. The issue before the district court was Rocha’s guilt on the charged offenses, not counsel’s performance in conducting Rocha’s defense. That is precisely why we have held in countless cases that the record on direct appeal is insufficient for assessing claims of ineffective assistance of counsel.<sup>4</sup> The majority does not explain how it can review a mixed question of law and fact when the requisite factual findings have never been made by a trial court.

The reasons why an appellate court usually cannot and should not consider ineffective assistance of counsel claims on direct appeal from a criminal conviction were explained by the U.S. Supreme Court in *Massaro v. United States*.<sup>5</sup>

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<sup>2</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>3</sup> *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

<sup>4</sup> See, e.g., *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013); *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013); *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013); *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013); *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012); *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012), cert. denied \_\_\_ U.S. \_\_\_, 133 S. Ct. 158, 184 L. Ed. 2d 78; *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010); *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008); *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005); *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004); *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003); *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003); *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002); *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001); *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

<sup>5</sup> *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003).

Although the Court acknowledged the possibility that ineffective assistance of counsel could be evident from a trial record alone, it observed that such cases would be few. The Court's reasons clearly apply to Rocha's direct appeal and explain why this court should decline to address his claims of ineffective assistance of counsel. The Court noted that a trial record reviewed on direct appeal is "not developed . . . for the object of litigating or preserving the [ineffective assistance of counsel] claim and thus often incomplete or inadequate for this purpose."<sup>6</sup> The Court further reasoned that because evidence at a criminal trial is "devoted to issues of guilt or innocence, . . . the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis."<sup>7</sup> For example, the Court noted that

[i]f the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.<sup>8</sup>

And the Court reasoned that "[t]he trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them."<sup>9</sup> Because of the inadequacy of the trial record as a basis for adjudicating ineffective assistance of counsel claims, the Court concluded that such claims ordinarily should be litigated in the first instance in the district court, "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial."<sup>10</sup>

Although this court generally requires ineffective assistance of counsel claims to be raised on direct appeal in order to

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<sup>6</sup> *Id.*, 538 U.S. at 505.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

be preserved for postconviction review,<sup>11</sup> we have steadfastly followed the principle that the fact that such a claim may be raised on direct appeal does not mean that it can be resolved.<sup>12</sup> The determining factor is whether the record is sufficient to adequately review the question.<sup>13</sup> And with the exception of *State v. Faust*,<sup>14</sup> when the ineffective assistance of counsel at issue could involve trial strategy, we have always found a trial record reviewed on direct appeal to be insufficient for adequate review because it does not tell us the reasons defense counsel tried the case in a particular manner.<sup>15</sup> We have prudently followed this course even while expressing skepticism as to whether counsel could have been pursuing a reasonable trial strategy. For example, in *State v. Sidzyik*,<sup>16</sup> the defendant claimed on direct appeal that his trial counsel was ineffective in not objecting when the prosecutor made statements at sentencing after agreeing as a part of the plea agreement to stand silent. We concluded that there had been a material breach of the plea agreement and noted that “‘it would be a rare circumstance when a lawyer with ordinary training and skill in the area of criminal law would not inform the court of the breach.’”<sup>17</sup> But we concluded that the record was insufficient to review the ineffective assistance of counsel claim because it was “not clear from the record . . . whether [the defendant’s] counsel did not object to the breach of the plea agreement based on trial strategy.”<sup>18</sup>

But in *Faust* and now in this case, the majority reaches and resolves the ineffective assistance of counsel claim on direct

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<sup>11</sup> See, *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

<sup>12</sup> E.g., *State v. Watt*, *supra* note 4; *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

<sup>13</sup> *Id.*

<sup>14</sup> *State v. Faust*, *supra* note 1.

<sup>15</sup> See, e.g., cases cited *supra* note 4.

<sup>16</sup> *State v. Sidzyik*, *supra* note 12.

<sup>17</sup> *Id.* at 314, 795 N.W.2d at 288-89 (quoting *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003)).

<sup>18</sup> *Id.* at 314, 795 N.W.2d at 289.

appeal because it “can conceive of no reasonable strategic reason” for the challenged performance of defense counsel. I believe that this “we know it when we see it” approach to the question of whether counsel had no reasonable trial strategy is unsound.

Here, we simply do not have the information necessary to make a principled determination of whether counsel acted, or did not act, pursuant to some reasonable trial strategy. There is a strong presumption that trial counsel acted reasonably.<sup>19</sup> Trial counsel is afforded due deference to formulate trial strategy and tactics, and we are not to second-guess trial counsel’s reasonable strategic decisions when reviewing claims of ineffective assistance of counsel.<sup>20</sup> And we are required to assess trial counsel’s performance from the counsel’s perspective when the counsel provided the assistance,<sup>21</sup> not in hindsight. The fact that a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective.<sup>22</sup>

These sound principles recognize that no one knows more about a case than the lawyer who tries it. Before trial, a criminal defense lawyer conducts confidential communications with his or her client, interviews witnesses, and reviews police reports and other information compiled by the State. It is from this knowledge base that the lawyer formulates trial strategy by application of professional judgment to particular facts and circumstances. The trial record tells us how the lawyer elected to try the case, but it ordinarily does not disclose counsel’s reasons for taking, or not taking, a particular action. Any experienced trial lawyer knows that there can be sound strategic reasons for not filing a motion, for not making an objection, or for not requesting a limiting instruction, even if there are grounds to do so. It is impossible to determine whether counsel acted or refrained from acting pursuant to a reasonable trial

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<sup>19</sup> *State v. Watt*, *supra* note 4; *State v. Huston*, *supra* note 4.

<sup>20</sup> See, e.g., *State v. Huston*, *supra* note 4; *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

<sup>21</sup> *State v. Edwards*, *supra* note 20.

<sup>22</sup> *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

strategy without knowing what counsel knew at the time of the challenged conduct, and why he or she tried the case in a particular manner. We simply cannot tell from this record why Rocha's counsel did not file a motion to sever the charges or request a limiting instruction. And we should not guess or jump to the conclusion that we can "conceive of no strategic reason" for a particular action taken by counsel during the course of a criminal trial.

The majority's willingness to conclude that Rocha's counsel could not have been acting pursuant to a reasonable trial strategy is at odds with the reasoning of *State v. Poe*,<sup>23</sup> decided just last year. In *Poe*, we reversed an order denying postconviction relief without an evidentiary hearing because the files and records of the case, which are essentially the trial record, contained no explanation for trial counsel's failure to cross-examine a key prosecution witness with a prior inconsistent statement in which the witness identified someone other than the defendant as the perpetrator of the crime. We reasoned that "[u]nder these circumstances, trial counsel's strategy is a matter of conjecture."<sup>24</sup> In this case, as in *Poe*, the record does not disclose counsel's strategy in not taking a particular action at trial. Further factfinding was required in *Poe* in order to address that issue, and it is likewise required here. In my view, the majority's bold statement that it can "conceive of no strategic reason" for Rocha's counsel not to move to sever the charges or to request a limiting instruction is pure "conjecture," i.e., "the formation or expression of an opinion without sufficient evidence for proof."<sup>25</sup>

In addition to reaching a result without adequate factual support, the majority's reasoning prevents the relevant facts from ever being determined. Had this court followed our normal procedure and declined to reach the ineffective assistance claim on direct appeal, Rocha could have asserted the same claim in a motion for postconviction relief. Because the files

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<sup>23</sup> *State v. Poe*, *supra* note 3.

<sup>24</sup> *Id.* at 774, 822 N.W.2d at 849.

<sup>25</sup> Webster's Encyclopedic Unabridged Dictionary of the English Language 310 (1989).

and records of the case now before us on direct appeal do not affirmatively show that his claim is without merit, he would be entitled to an evidentiary hearing<sup>26</sup> at which his trial counsel would likely be a witness.

And what if, at a postconviction evidentiary hearing, trial counsel testified that Rocha had always insisted that he was innocent of all charges and that the children fabricated their allegations because he was strict with them and was not their biological father? What if counsel testified that after consultation, Rocha insisted on testifying in his own defense, and counsel concluded that under Neb. Ct. R. of Prof. Cond. § 3-501.2(a), he was ethically required to abide by that decision? What if counsel testified that he determined that the mother of the children would testify in Rocha's defense, specifically that the children had never reported physical or sexual abuse to her and that the alleged sexual assault victim "had an imagination and made up stories"? What if counsel testified that given the absence of any physical evidence of sexual or physical abuse and Rocha's insistence on testifying in his own defense, counsel concluded that the best strategy for obtaining acquittal on all charges was to have a single trial in which he would seek to create reasonable doubt as to the credibility of the complaining witnesses, rather than moving to sever the charges and thus giving the State two opportunities to cross-examine Rocha and obtain felony convictions? What if counsel testified that he reviewed the pros and cons of severance with his client and that Rocha agreed with counsel's assessment that Rocha stood a better chance of acquittal on all charges in a single trial? What if counsel testified that he did not request a limiting instruction requiring the jury to consider the children's testimony only for specific purposes because counsel's strategy was to characterize the children's testimony as totally lacking in credibility and therefore unworthy of the jury's consideration on any charge? I think it is possible, if not probable, that a district court hearing this testimony would conclude that this strategy was reasonable from defense counsel's perspective at trial and was therefore not ineffective assistance of

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<sup>26</sup> See Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2012).

counsel. In such a scenario, Rocha's otherwise valid criminal convictions would not be overturned.

But because of the majority's preemptive adjudication of the ineffective assistance claim on the trial record alone, we will never know the reasons defense counsel did not move to sever the charges or request a limiting instruction. I submit that the majority cannot "conceive" of a strategic explanation for counsel's performance at trial because it does not know all the facts and has eliminated the procedural means of acquiring them. The majority's approach violates a fundamental principle of appellate review in criminal cases—a principle codified for over 90 years—that no judgment in a criminal case may be set aside if the court considers that no substantial miscarriage of justice has actually occurred.<sup>27</sup> Without having the facts in the record, an appellate court cannot assess whether a miscarriage of justice has occurred. Despite the absence of necessary facts and the existence of a procedure for ascertaining them, the majority nonetheless sets these judgments of conviction aside in contravention of the statutory mandate.

Finally, I cannot accept the majority's conclusion that this is a case in which requiring "the defendant to file a postconviction action can be only a waste of judicial time."<sup>28</sup> In my view, it is never a waste of judicial time to follow standard procedures designed to ensure that a court has all relevant facts necessary to decide whether a criminal conviction should stand. And I believe that it is the majority's approach which could, in this case or another, lead to what would truly be a waste of judicial time: an unnecessary retrial.

Finding no merit in any of Rocha's other assignments of error, I would affirm his convictions and sentences without reaching his ineffective assistance of counsel claim, thereby permitting him to pursue his postconviction remedy on that issue.

CASSEL, J., joins in this dissent.

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<sup>27</sup> See Neb. Rev. Stat. § 29-2308 (Reissue 2008).

<sup>28</sup> *State v. Faust*, *supra* note 1, 265 Neb. at 876, 660 N.W.2d at 872.

STATE OF NEBRASKA, APPELLEE, V.  
PAUL A. VALVERDE, APPELLANT.  
835 N.W.2d 732

Filed July 19, 2013. No. S-12-444.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
4. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
5. **Rules of Evidence: Sexual Assault: Other Acts.** Neb. Rev. Stat. § 27-414 (Cum. Supp. 2012) allows evidence of prior offenses of sexual assault to prove propensity.
6. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Neb. Rev. Stat. § 27-414 (Cum. Supp. 2012) requires a hearing outside the presence of the jury before the court admits evidence of the accused's commission of another offense of sexual assault.
7. **Rules of Evidence: Sexual Assault: Other Acts: Time.** Neb. Rev. Stat. § 27-414 (Cum. Supp. 2012) does not impose any timing requirement as to when the required hearing outside of the presence of the jury must be held.
8. **Rules of Evidence: Other Acts: Time: Intent.** The admissibility of evidence concerning other conduct must be determined upon the facts of each case, and no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is too remote.
9. **Rules of Evidence: Other Acts: Time.** The question whether evidence of other conduct is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.
10. **Rules of Evidence: Other Acts.** Under the plain language of Neb. Rev. Stat. § 27-414(3)(c) (Cum. Supp. 2012), the court is to compare the similarity of the other acts to the crime charged.
11. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
12. **Motions for Mistrial: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.

13. **Jury Instructions.** In the absence of a request for a limiting instruction, there is no reversible error in a court's failure to give a limiting instruction.
14. **Rules of Evidence: Sexual Assault: Other Acts.** Evidence of another offense or offenses of sexual assault, if admissible in a prosecution for an offense of sexual assault, is not received for a limited purpose but may be considered on any matter to which it is relevant.
15. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
16. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
17. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
18. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

## I. INTRODUCTION

In this appeal from convictions and sentences for child abuse and sexual assault, we primarily address the district court's procedures regarding evidence of prior sexual offenses under Neb. Rev. Stat. § 27-414 (Cum. Supp. 2012). Before trial, the court heard testimony from the accused's prior victims, compared the testimony to the current charges, and made a conditional ruling of admissibility. But the court prohibited the State from mentioning or presenting the § 27-414 evidence at trial until after the evidence of the current alleged victims. At trial, the State

first presented the “current” evidence. Then, outside the presence of the jury, the State gave notice of its intent to present the § 27-414 evidence and the court made a final determination of its admissibility. We find no error in the procedures used by the district court, and we reject the other assignments of error challenging the court’s rulings on a motion for mistrial and on jury instructions. Accordingly, we affirm.

## II. BACKGROUND

Paul A. Valverde, born in February 1969, is the father of H.L. and the uncle of B.V., both of whom were born in March 1997. The State charged Valverde with two counts of third degree sexual assault of a child, second offense; four counts of child abuse; and four counts of first degree sexual assault of a child, second offense, relating to acts committed against H.L. and B.V. at several locations in Sarpy County, Nebraska, during periods of time between June 1, 2008, and December 10, 2010. The State later moved to dismiss one count of first degree sexual assault of a child, second offense. Because the issues in this appeal are largely limited to the district court’s proceedings under § 27-414, we do not summarize various other aspects of the case.

### 1. FIRST HEARING

In April 2011, the State moved to admit evidence of Valverde’s commission of another act of sexual assault under § 27-414. The State alleged that Valverde sexually assaulted E.M. when she was 14 years old, fathered a child with her when she was 15 years old, and was convicted of third degree sexual assault of a child in 1995 for the sexual assaults committed on E.M. The State also alleged that in 1988, when Valverde was 20 years old, he molested his 11-year-old niece, T.K. Because T.K. did not testify regarding any sexual assault at trial, we omit further discussion of the evidence adduced at the § 27-414 hearing related to her.

During a hearing on the State’s motion, evidence established that E.M., born in June 1979, met Valverde in 1993, when she was 14 years old and he was 24 years old. While E.M. was at Valverde’s apartment during the summer of 1993, Valverde

put his hands down her pants and inserted his fingers into her vagina. At other times while E.M. was 14 years old, Valverde inserted his penis into her vagina. The sexual intercourse continued when E.M. turned 15 years old, and she gave birth to Valverde's child when she was 15.

On June 28, 2011, the district court entered an order, finding by clear and convincing evidence that Valverde committed multiple sexual assaults upon E.M. under Neb. Rev. Stat. § 28-319 (Reissue 2008). The court observed that two of the crimes charged in the instant case involved subjecting another person 14 years of age or younger to sexual contact when Valverde was at least 19 years of age, that three charges involved subjecting another person who was at least 12 years of age but less than 16 years of age to sexual penetration when Valverde was 25 years old or older, and that one charge involved subjecting another person who was under 12 years of age to sexual penetration when Valverde was 19 years or older. The court noted that Valverde committed sexual assaults upon E.M. when she was age 14, which was a similar age to H.L. and B.V., and that Valverde was age 19 or older in the prior and current alleged sexual assaults. The court stated that "although the details of the acts that underlie the present charges were not offered, the present charges themselves are of a similar nature to the prior sexual assaults." The court determined that the acts against E.M. were not overly prejudicial from a timing standpoint and that the risk of prejudice did not substantially outweigh the probative value of the evidence of the prior sexual assaults. Therefore, the court determined that E.M. would be allowed to testify at trial regarding the prior sexual assaults committed upon her by Valverde.

## 2. SECOND HEARING

In October 2011, the State filed another motion seeking to admit evidence under § 27-414. The State alleged that Valverde sexually assaulted H.A., formerly known as H.R., when she was 13 years old and that he was convicted of third degree sexual assault of a child in 1995 for the sexual assault.

During a hearing on the motion, H.A., born in November 1981, testified that she agreed to babysit a child of Valverde's

on one occasion when she was 13 years old. After putting the baby to bed, H.A. fell asleep on a couch and awoke to Valverde's touching her breasts. He also touched her legs and "bottom area." The next day, H.A. reported the incident to the police. The court received into evidence a certified copy of Valverde's conviction for the incident and a copy of the operative information in the instant case.

On November 23, 2011, the district court entered an order granting the State's motion. The court found that Valverde committed a sexual assault upon H.A. pursuant to Neb. Rev. Stat. § 28-320.01 (Reissue 2008). The court stated that H.A. was 13 years old when Valverde committed the sexual assault upon her, which was a similar age to H.L. and B.V. as alleged in two of the counts of the operative information and that Valverde was 19 years or older at the time of the prior and present alleged sexual assaults. The court further stated that

although the details of the acts that underlie the present charges were not offered, the present charges themselves are of a similar nature to the prior sexual assaults. Therefore, the prior sexual assault committed by [Valverde] upon [H.A.] is found *at this point in this opinion* to be both probative and relevant to the present crimes charged.

(Emphasis in original.) The court stated that H.A. would be allowed to testify at trial, subject to certain restrictions. Due to concerns about cumulative evidence, the court limited the State, in its case in chief, to either calling H.A. to testify or offering Valverde's prior conviction.

The district court compared a pretrial motion to allow evidence under § 27-414 to a motion in limine, because both call for a pretrial ruling to determine the admissibility of evidence. The court emphasized that its ruling allowing the State to present evidence of the prior sexual assaults was not a final ruling due largely to the lack of specificity of facts regarding the current sexual assaults because H.L. and B.V. did not testify in either hearing on the motions to allow evidence under § 27-414. The court prohibited the State from presenting any

evidence under § 27-414 until after evidence had been offered regarding the alleged sexual acts as charged in the operative information. The court continued:

After the evidence has been presented as to the alleged sexual acts that are contained within the present Information, then, the State shall notify the Court and [Valverde], outside of the presence of the jury, that it intends to call as a witness either [H.A.], [E.M.], and/or [T.K.] This procedure allows the Court to make a further determination, outside of the presence of the jury, if called upon to render such a ruling, the admissibility of any evidence pursuant to . . . §27-414.

The court further stated, “Although, only advisory to the parties, in the event [H.A.], [E.M.], and/or [T.K.] do testify at trial, this Court shall issue a cautionary instruction as to their testimony.”

### 3. TRIAL

A jury trial commenced, and consistent with the district court’s order, the State did not allude to assaults on the prior victims in its opening statement. The State called B.V. as its first witness. B.V. testified that on July 4, 2009, he went with his family to his grandmother’s house; Valverde and H.L. were also present. That evening, Valverde told B.V. to “check and see if [B.V.] had sperm.” B.V. “checked” by masturbating, and then Valverde stroked B.V.’s penis. While B.V. had an erection, Valverde pulled down H.L.’s pants and underwear and inserted B.V.’s penis into H.L.’s vagina. According to B.V., Valverde then pushed on B.V.’s back in an up-and-down motion. B.V. felt uncomfortable, so he removed his penis so that it was touching H.L.’s leg when Valverde was not looking. B.V. testified that Valverde said B.V. was “not doing it right” and that Valverde would “show [B.V.] how it’s done.” Valverde then told B.V. to suck on H.L.’s breasts while Valverde had vaginal intercourse with H.L.

The State next called H.L. to testify. H.L. began living with Valverde when she was 12 years old. In approximately June 2009, they moved to H.L.’s grandmother’s home, and Valverde began having sexual intercourse with her a few

weeks later. H.L. testified that Valverde would motion her to go downstairs, she would lie on the floor, and Valverde would remove her clothes and have intercourse with her. According to H.L., Valverde would ejaculate onto H.L.'s stomach and then she would go to the bathroom to clean up. H.L. testified that Valverde would also touch her breasts.

H.L. testified that in the late evening of July 4, 2009, Valverde motioned her to go downstairs. She went downstairs and lay on the floor. According to H.L., B.V. came downstairs and began removing his clothes at Valverde's direction. H.L. testified that Valverde directed B.V. to get on top of H.L. and put his penis into her vagina and that Valverde guided B.V.'s penis into her vagina. H.L. testified that at some point, Valverde told B.V. to get off of H.L. and said that B.V. was "not doing it right." B.V. then began sucking on H.L.'s breasts, and Valverde had vaginal intercourse with her. They lived at H.L.'s grandmother's house until October 2009, during which time Valverde had intercourse with H.L. two or three times a week. H.L. testified that the sexual intercourse continued when H.L. and Valverde moved to an apartment. The acts took place in Valverde's bedroom and regularly occurred four or five times a week. Valverde also made H.L. perform oral sex on him on occasion.

In approximately May 2010, when H.L. was 13 years old, H.L. told Valverde that her menstrual period was late and Valverde bought her a pregnancy test. The test was negative, but within a week Valverde took H.L. to a doctor to have an intrauterine device inserted. H.L. and Valverde moved to a different apartment in October, and the sexual intercourse continued to occur two or three times a week. On December 10, H.L. was supposed to spend the night with her mother. But first, Valverde had intercourse with her on his bed and some of his semen got on H.L.'s underwear. The next day, H.L. disclosed to her mother that Valverde had been making her have sex with him. H.L.'s mother called the police, and an officer escorted them to a hospital. A "rape kit" was administered. Semen was found on H.L.'s underwear and the vaginal swab from the kit. DNA was extracted from these items. The probability of an unrelated individual other than

Valverde matching the DNA profile of the sperm on H.L.'s underwear was 1 in 14.8 quintillion for Caucasians, 1 in 12.6 quintillion for African Americans, and 1 in 61.6 quintillion for American Hispanics.

While the jury was absent from the courtroom, the State announced that E.M. was the next witness it would like to call. Valverde's counsel argued that under Neb. Rev. Stat. § 27-403 (Reissue 2008), the probative value of the evidence of the prior sexual assault did not outweigh the danger of prejudice. The district court responded:

The Court, in an abundance of caution in the second ruling, November 23, 2011, restricted or prohibited the State from mentioning this [§ 27-414] evidence as to those three prospective witnesses until the Court had an opportunity to hear the evidence, the actual specific evidence as to the pending allegations. However, the Court had already made a finding there was [sic] similarities based upon the charges alone. And after hearing the evidence from both the alleged victims in the trial up to now, the Court finds there are sufficient similarities to proceed, and [Valverde's] objection is overruled at this time.

Valverde moved for a mistrial based upon the procedures used by the court with respect to the prior victims. The court denied the motion.

E.M. is B.V.'s mother. She provided testimony similar to that at the hearing under § 27-414. Valverde did not request a limiting instruction following E.M.'s testimony.

Outside the presence of the jury, the State offered a certified copy of Valverde's prior conviction for third degree sexual assault of a child regarding H.A. Valverde objected, arguing that the exhibit's prejudicial effect to Valverde was outweighed by its probative value and that it would be better for the State to bring in the witness to testify so the jury could make a credibility determination. The court overruled the objection. Valverde objected when the State offered the exhibit into evidence, and the court overruled the objection. Valverde did not request a limiting instruction concerning the exhibit.

The State called T.K. to testify, but because T.K. had trouble recalling dates and whether Valverde was 19 years of age at the time of the incidents, the court sustained an objection by the defense. As mentioned earlier, T.K. ultimately did not testify regarding any sexual assault by Valverde. After the State rested, Valverde rested without presenting any evidence.

During the jury instruction conference, Valverde objected to instruction No. 13 regarding limited purpose but the district court responded that the instruction would be given. Valverde also took issue with instruction No. 15, the instruction involving other acts of sexual assault under § 27-414. The court declined to give Valverde's proposed instructions addressing limited purpose and evidence of prior sexual assaults.

The jury returned a verdict of guilty on all counts. The court subsequently imposed sentences of incarceration.

Valverde timely appeals. Pursuant to statutory authority, we granted the State's petition to bypass the Nebraska Court of Appeals.<sup>1</sup>

### III. ASSIGNMENTS OF ERROR

Valverde assigns error to the procedures used by the district court in receiving evidence under § 27-414, to the court's failure to grant a mistrial, and to the court's giving of certain jury instructions and refusal of others.

### IV. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.<sup>2</sup> Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.<sup>3</sup>

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<sup>1</sup> See Neb. Rev. Stat. § 24-1106(2) (Reissue 2008).

<sup>2</sup> *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

<sup>3</sup> *Id.*

[3] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.<sup>4</sup>

[4] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.<sup>5</sup>

## V. ANALYSIS

### 1. § 27-414 EVIDENCE

This is the first appeal in which we have focused on evidence of “another offense or offenses of sexual assault” relying solely upon § 27-414. Prior to our recent decision in *State v. Kibbee*,<sup>6</sup> we analyzed similar evidence solely as evidence of “other crimes, wrongs, or acts” under Neb. Rev. Stat. § 27-404 (Cum. Supp. 2012).<sup>7</sup>

In *Kibbee*, we addressed evidence offered under both §§ 27-404 and 27-414. There, the State filed a notice of intent to offer prior bad acts evidence pursuant to § 27-404(2) and a notice of intent to offer evidence pursuant to § 27-414 of similar offenses committed by the defendant. The trial court analyzed the admission of the evidence under § 27-404, but we determined that the evidence was admissible under § 27-414 and that we did not need to conduct a separate analysis under § 27-404(2).

In the instant appeal, neither the parties nor the court considered the evidence at issue under § 27-404; thus, § 27-404 is not implicated in this appeal. Significant consequences follow from the State’s reliance solely upon § 27-414.

#### (a) Statutory Language of § 27-414

We begin by setting forth the complete language of the statute at issue. Section 27-414 provides:

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., *State v. Dreimanis*, 258 Neb. 239, 603 N.W.2d 17 (1999).

(1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.

(2) In a case in which the prosecution intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) Before admitting evidence of the accused's commission of another offense or offenses of sexual assault under this section, the court shall conduct a hearing outside the presence of any jury. At the hearing, the rules of evidence shall apply and the court shall apply a section 27-403 balancing and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may consider any relevant factor such as (a) the probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged.

(4) This section shall not be construed to limit the admission or consideration of evidence under any other section of the Nebraska Evidence Rules.

#### (b) Procedures Used by District Court

We next summarize the procedures implemented by the district court. After the State filed its motions to use § 27-414 evidence, the district court held hearings at which evidence of prior sexual assaults was adduced.

During the pretrial hearings, the court heard testimony from the prior victims. Although the court did not hear testimony

from H.L. or B.V., the court compared the evidence of the prior sexual assaults to the current charges contained in the information. Based on similarities between the prior sexual assaults and the current charges, the court stated that the prior victims would be allowed to testify at trial. However, the court emphasized that its ruling allowing the State to present evidence of the prior sexual assaults was not a final ruling on the ultimate admissibility of the evidence. The court prohibited the State from presenting any evidence at trial of the prior sexual assaults until after the State presented evidence as to the alleged sexual assaults against H.L. and B.V.

After such evidence was presented at trial and the State alerted Valverde and the court of its intent to call a prior victim as a witness, the court made a further determination, outside the presence of the jury, of the admissibility of the prior sexual assaults.

In essence, the district court made conditional rulings at the pretrial hearings, reserving final rulings on the admissibility of the evidence under § 27-414 until trial. In doing so, the court followed a framework urged in a legal treatise:

What is at issue in the [§ 27-414 hearing] is the “other acts” evidence, not the proof of the misconduct that is at issue in the instant case and yet to be tried. Consequently, there should be no requirement that the victim of the action being tried has to testify at the pretrial hearing. The court could take judicial notice of the charges that have been filed in the court and admit the evidence conditionally under [Neb. Rev. Stat. § 27-104(2) (Reissue 2008)]. If the state does not offer sufficient admissible evidence at trial to raise a jury issue that the charged conduct occurred that would make the “other crimes” evidence admissible, then allegations [o]f the “other crimes” evidence would be inadmissible.<sup>8</sup>

The court’s procedures ensured that the evidence of the current acts came in at trial—in the presence of the jury—and in making a final determination on the admissibility of evidence under § 27-414, the court compared the prior acts to the current

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<sup>8</sup> R. Collin Mangrum, *Mangrum on Nebraska Evidence* 310-11 (2013).

acts. The procedures also ensured that none of the § 27-414 evidence—which must be presented to the court outside the presence of the jury—was disclosed to the jury until after the court made a final determination on admissibility.

Section 27-414 is patterned after Fed. R. Evid. 413. But § 27-414(1) adds a requirement, not included in the federal rule, of “clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses.” The Nebraska statute also explicitly requires a hearing outside the presence of a jury and a balancing under § 27-403.<sup>9</sup> Nothing in either rule conflicts with the procedures employed by the district court. In fact, the Seventh Circuit approved of similar procedures in *U.S. v. Hawpetoss*.<sup>10</sup> In *Hawpetoss*, the trial court, prior to trial, determined that the prior acts evidence was similar to the charged conduct and was admissible, but the court stressed that its ruling was tentative and that it intended to reconsider its ruling during the trial so that it could evaluate the admission of the evidence in light of the evidence presented to the jury. As in the instant case, the trial court in *Hawpetoss* forbade the parties from mentioning the prior acts evidence in their opening statements.

We now consider Valverde’s first assignment of error as it relates to pertinent subsections of § 27-414.

(c) § 27-414(1)

Under § 27-414(1), evidence of the accused’s prior commission of another offense of sexual assault is admissible if there is clear and convincing evidence that the accused committed the other offense. Valverde’s brief does not appear to contest whether the State met the clear and convincing evidence standard. And, as the State observes, “Valverde left behind both a human and paper trail that made his prior sexual assaults matters of unquestioned historical fact. He fathered a child by sexually assaulting [E.M.] Valverde was criminally convicted for sexually assaulting [H.A.], as established by court conviction

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<sup>9</sup> See § 27-414(3).

<sup>10</sup> *U.S. v. Hawpetoss*, 478 F.3d 820 (7th Cir. 2007).

records.”<sup>11</sup> We therefore find no merit in Valverde’s assignment of error that the State failed to produce clear and convincing evidence that the prior sexual assaults occurred.

[5] Section 27-414 allows evidence of prior offenses of sexual assault to prove propensity.<sup>12</sup> Section 27-414(1) explicitly provides that evidence of the accused’s commission of another offense of sexual assault “may be considered for its bearing on any matter to which it is relevant.” In contrast, § 27-404(2) did not allow evidence to prove propensity, stating “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith.” But § 27-404(2) allowed prior acts evidence for purposes other than propensity, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Clearly, evidence of Valverde’s prior sexual assaults could be admitted under § 27-414—subject to the balancing under § 27-403, which we discuss below—to show his propensity to commit such acts.

(d) § 27-414(2)

Under § 27-414(2), the prosecuting attorney is to disclose to the accused, at least 15 days before trial, the evidence that is expected to be offered. During oral argument, Valverde’s counsel conceded that he was given notice at least 15 days before trial of the evidence the State intended to offer. Valverde does not claim in his brief that the State did not comply with § 27-414(2).

(e) § 27-414(3)

The main thrust of Valverde’s first assignment of error relates to the requirements of § 27-414(3). We examine them in turn.

(i) *Hearing Outside Presence of Jury*

[6] Section 27-414 requires a hearing outside the presence of the jury before the court admits evidence of the accused’s

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<sup>11</sup> Brief for appellee at 28.

<sup>12</sup> See *State v. Kibbee*, *supra* note 2.

commission of another offense of sexual assault. Valverde argues that the district court's procedures violated this statutory mandate. We disagree.

[7] The statute does not impose any timing requirement as to when this hearing must be held. The district court held two hearings prior to trial at which it heard evidence of the prior sexual assaults. The court compared the evidence adduced during those hearings to the charges in the current case. The court's order after the second hearing specifically stated that it was not a final ruling on the ultimate admissibility of the prior sexual assaults. It made its final determination after hearing the trial testimony of H.L. and B.V. and comparing that testimony to the testimony of E.M. and H.A. adduced during the hearings pursuant to § 27-414. The final determination followed additional arguments made outside the jury's presence.

The court's procedures prevented the jury from hearing potentially inadmissible evidence of prior sexual assaults until the court made its final ruling on admissibility. We find no abuse of discretion by the court in this regard.

*(ii) Balancing Under § 27-403*

Much of Valverde's argument focuses on the required § 27-403 balancing. Section § 27-414(3) sets forth factors that the court may consider in balancing, to which we now turn.

a. Probability That Other  
Offense Occurred

The first factor, the probability that the other offenses occurred, is not seriously disputed. And as discussed above, a child was born as a result of Valverde's sexual assault of E.M. and a criminal conviction resulted from Valverde's sexual assault of H.A. This factor weighs in favor of admission of the prior sexual assaults.

b. Proximity in Time and Intervening  
Circumstances of Other Offenses

Valverde relies heavily on the gap in time between the prior and the current offenses. The assaults against E.M. began in

1993, and the assault against H.A. occurred in 1995, whereas the assaults against H.L. occurred beginning in 2008, and the assault against B.V. occurred in 2009.

[8,9] The admissibility of evidence concerning other conduct must be determined upon the facts of each case, and no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is too remote.<sup>13</sup> “The question whether evidence of other conduct ‘is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.’”<sup>14</sup>

The Nebraska appellate courts have considered the remoteness of time under § 27-414 on two occasions. In *Kibbee*,<sup>15</sup> the charged act took place in 2009, and we found no abuse of discretion in the admission of evidence regarding prior acts that occurred between 1983 and 1995. The Nebraska Court of Appeals similarly found no abuse of discretion in admitting evidence of an earlier offense that occurred in 1996, where the current offense took place in 2009.<sup>16</sup>

We have allowed admission of evidence even more remote in time in the context of § 27-404. In *Kibbee*, we discussed other cases allowing evidence of prior crimes committed 27 years earlier,<sup>17</sup> 11 to 20 years prior to trial,<sup>18</sup> and 10 years prior to the charged crime.<sup>19</sup>

Remoteness in time is just one factor in the § 27-403 balancing. Here, Valverde last sexually assaulted H.L. approximately 17 years after he first began sexually assaulting E.M. However, the pattern of generational assaults within the same family

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<sup>13</sup> *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990).

<sup>14</sup> *State v. Kibbee*, *supra* note 2, 284 Neb. at 97, 815 N.W.2d at 893, quoting *State v. Yager*, *supra* note 13.

<sup>15</sup> *State v. Kibbee*, *supra* note 2.

<sup>16</sup> See *State v. Craigie*, 19 Neb. App. 790, 813 N.W.2d 521 (2012).

<sup>17</sup> *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991).

<sup>18</sup> *State v. Yager*, *supra* note 13.

<sup>19</sup> *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

at similar ages—as further discussed below—weighs heavily against Valverde’s argument.

c. Similarity of Other Acts  
to Crime Charged

[10] Valverde complains that the district court could not have compared the current offenses to the prior offenses because “there were no facts of the current case provided for comparison.”<sup>20</sup> His complaint is based on the court’s not requiring H.L. and B.V. to testify at the hearings under § 27-414. It is true that the court had only the allegations contained in the information with which to compare the prior sexual assaults at the time of its preliminary rulings on the admissibility of those prior sexual assaults. But under the plain language of § 27-414(3)(c), the court is to compare the “similarity of the other acts *to the crime charged*.” (Emphasis supplied.) That is precisely what the court did. Further, the district court did not make its final ruling on admissibility until after hearing the trial testimony of H.L. and B.V. Thus, contrary to Valverde’s repeated assertions, the court was able to consider the facts of the current charged crimes before making a final ruling on balancing under § 27-403.

Valverde also places great weight on the differences between the prior and current offenses. He points out that the assaults occurred at different locations, that the victims were different ages, and that the nature of the acts differed.

But we find much more significance in the similarities. While the assaults occurred at different locations, the prior and current assaults all occurred at the place where Valverde was living. And while the ages of the victims may have varied, they were of similar adolescent ages: E.M. was 14 years old when the assaults began, H.A. was 13 years old, B.V. was 12, and H.L. was sexually assaulted from the time she was 12 until the time she reported the assaults when she was 14. All of the assaults occurred when Valverde was at least 24 years of age. And while the nature of some of the acts differed, other acts were the same. Valverde digitally penetrated and repeatedly

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<sup>20</sup> Brief for appellant at 24.

had vaginal intercourse with E.M. He touched H.A.'s breast and "bottom area" and told her that he wanted to have sex with her. Valverde touched H.L.'s breasts, repeatedly had vaginal intercourse with her, and made her perform oral sex on him. Valverde touched B.V.'s penis and prompted him to engage in intercourse with H.L. All of the victims knew Valverde, and there was a family-like relationship. Valverde was living with E.M.'s father when Valverde first began sexually assaulting E.M. Valverde and E.M. had a child together, and H.A. was babysitting that child at the time that Valverde assaulted her. H.L. is Valverde's daughter. And B.V., E.M.'s son, is Valverde's nephew.

We noted a number of similarities in *Kibbee*<sup>21</sup> in determining that the trial court did not abuse its discretion in allowing evidence of prior assaults. Like in the instant case, all of the victims in *Kibbee* knew the accused and all of the victims were under the age of majority at the time the sexual assaults occurred. We observed in *Kibbee* that the defendant digitally penetrated all of the victims, that two victims were awakened to find the defendant touching them inappropriately, and that one victim reported the defendant was sitting on the floor next to her—similar to the current victim's report that the defendant was kneeling on the floor next to her. Also in *Kibbee*, we pointed out the similarities of prior sexual assaults in *State v. Carter*<sup>22</sup> as follows:

All assaults occurred when the victims were between the ages of 6 and 11; all of the victims were subjected to multiple assaults; all assaults occurred at the defendant's residence, his mother's residence, or the victim's residence; all of the victims had either a familial or a family-like relationship to the defendant; all assaults occurred while the defendant had custody or was in complete control of the victims; and each of the victims was incapable of giving consent.<sup>23</sup>

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<sup>21</sup> *State v. Kibbee*, *supra* note 2.

<sup>22</sup> *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds*, *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

<sup>23</sup> *State v. Kibbee*, *supra* note 2, 284 Neb. at 95-96, 815 N.W.2d at 892.

Valverde argues that under *Kibbee* and *Carter*, overwhelming similarity between the prior and current offenses is required. In *Kibbee*, we stated: “We held that evidence of prior acts may be admitted where there are ‘an overwhelming number of significant similarities,’ but “[t]he term ‘overwhelming’ does not require a mechanical count of the similarities but, rather, a qualitative evaluation.””<sup>24</sup>

Valverde gives the “overwhelming similarity” language too much weight. As we mentioned at the start of our analysis, this case deals only with admission of evidence under § 27-414. *Kibbee*, on the other hand, involved both §§ 27-404 and 27-414. And § 27-404 prohibits the admission of prior bad acts if offered to prove propensity—the precise reason § 27-414 allows the evidence. *Kibbee* relied on *Carter*, which talked about similarities under § 27-404 for the purpose of proving identity. In that context—comparing crimes to see if they bear the same signature—an overwhelming number of similarities is needed. But in the framework of § 27-414 alone, *Kibbee* should not be read to require overwhelming similarity.

After balancing the above factors, the probative value of Valverde’s prior sexual assaults was not outweighed by the danger of unfair prejudice. We conclude that the district court did not abuse its discretion in allowing evidence of Valverde’s prior sexual assaults against E.M. and H.A.

## 2. MOTION FOR MISTRIAL

Valverde argues that the district court should have granted his motion for mistrial when the court decided to admit the § 27-414 evidence in the middle of the jury trial. After the court heard the trial testimony of H.L. and B.V., the court determined that the evidence of prior sexual assaults was admissible. Valverde objected and moved for a mistrial. He argued that the procedure placed the court in a position of judging the credibility and veracity of H.L. and B.V. Valverde further argued:

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<sup>24</sup> *Id.* at 96, 815 N.W.2d at 892.

I believe the Court's statement based upon the charges alone, that there seems to be similarities, I think that's improper with relation to [§ 27-414].

So especially in light of the fact that the State has not rested, defense has had no opportunity to put on its case in chief whether or not to challenge the veracity of the truthfulness of the statements of [B.V.] or the other witnesses. Those witnesses are still under subpoena, Judge, still subject to recall. And at that time, again, it's improper for the Court at this point in time to make a determination that the evidence that's been heard with respect to [B.V.] and [H.L.] is reliable and truthful under [§ 27-414].

[11,12] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.<sup>25</sup> A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.<sup>26</sup>

But, here, the timing of Valverde's motion is important. At the time that Valverde moved for a mistrial, the jury had not heard any evidence of other sexual assaults. There was no reason to grant a mistrial at the time of Valverde's motion, and he did not make a similar motion after the evidence of the prior sexual assaults was admitted. Although we do not believe that the motion would have had merit if made later, it clearly and definitively lacked merit at the time when it was made. We conclude that the district court did not abuse its discretion in denying Valverde's motion for mistrial.

### 3. JURY INSTRUCTIONS

#### (a) Limiting Instruction

Valverde attacks the absence of a limiting instruction at the time the evidence of the prior sexual assaults was received. This contention lacks merit for two reasons. First, a limiting

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<sup>25</sup> *State v. Kibbee*, *supra* note 2.

<sup>26</sup> *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

instruction was not requested. Second, because § 27-414 significantly differs from § 27-404, no limiting instruction would have been appropriate.

[13] Valverde did not request or propose any such instruction before, during, or after introduction of the evidence of the prior sexual assaults. In the absence of a request for a limiting instruction, there is no reversible error in a court's failure to give a limiting instruction.<sup>27</sup>

[14] Even if there had been a request, a limiting instruction was unnecessary. As one treatise explains, "No such limiting instruction would be necessary under [§ 27-414] because the evidence is admissible to prove sexual propensity, even though it may also be relevant for . . . secondary purposes such as proving intent."<sup>28</sup> The treatise further expounds that § 27-414 "obviate[s] the need for such limiting instructions" because such evidence "is admissible for the very purpose of demonstrating that the accused has a propensity to commit the type of sexual misconduct for which he or she has been charged. A limiting instruction would defeat the purpose of the rule."<sup>29</sup> This explanation follows directly from the express language of § 27-414(1), which provides that "such evidence may be considered for its bearing on any matter to which it is relevant." Thus, evidence of another offense or offenses of sexual assault, if admissible in a prosecution for an offense of sexual assault, is not received for a limited purpose but may be considered on any matter to which it is relevant. There was no need to give a limiting instruction at the time the evidence was admitted.

#### (b) Instruction on Limited Purpose

Valverde assigns error to the district court's overruling of his objection during the jury instruction conference to instruction No. 13, the instruction on limited purpose. Instruction No. 13 stated: "During this trial I called your attention to some evidence that was received for specified limited purposes;

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<sup>27</sup> See *State v. Fick*, 18 Neb. App. 666, 790 N.W.2d 890 (2010).

<sup>28</sup> Mangrum, *supra* note 8 at 308.

<sup>29</sup> *Id.* at 310.

you must consider that evidence only for those limited purposes and for no other.” Valverde argues that instruction No. 13 was “prejudicially insufficient given the nature of the [§] 27-414 evidence.”<sup>30</sup>

[15,16] Valverde’s argument is problematic for two reasons. First, instruction No. 13 did not address the evidence under § 27-414. Instead, it was directed at the times during trial when the court specifically informed the jury that it was receiving certain evidence for a limited purpose. But no such advisement was given after evidence of the assaults on E.M. or H.A. Second, Valverde seems to be asserting a different ground for his objection than that made during the jury instruction conference. An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.<sup>31</sup> During the instruction conference, Valverde offered defense’s proposed jury instructions Nos. 2 and 3 instead of instruction No. 13. But both of Valverde’s proposed instructions dealt with DNA collection and analysis. And now, in his brief, Valverde asserts that the court should have given an instruction patterned after NJI2d Crim. 5.3 on limited purpose. Valverde’s argument is difficult to comprehend, because instruction No. 13 *is* NJI2d Crim. 5.3A. In any event, Valverde asserts that the court should have instructed the jury as follows:

A. GENERAL LIMITED PURPOSE

Members of the jury, the evidence of (here insert description) was received for the limited purpose of (here insert purpose); you must consider the evidence only for that limited purpose and for no other.<sup>32</sup>

But Valverde did not request this instruction at closing. And we find no error in the court’s use of a pattern jury instruction. Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which

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<sup>30</sup> Brief for appellant at 37.

<sup>31</sup> *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds*, *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

<sup>32</sup> Brief for appellant at 35.

should usually be given to the jury in a criminal case.<sup>33</sup> This assignment of error lacks merit.

(c) Instruction Regarding Prior  
Sexual Assaults

Valverde argues that instruction No. 15, which dealt with the evidence of prior sexual assaults, was prejudicially insufficient to address the § 27-414 evidence. Instruction No. 15 provided:

You have heard evidence that [Valverde] may have committed other acts of sexual assault. Remember, you may not convict [Valverde] solely because you believe he committed other sexual assaults. [Valverde] is on trial only for the crimes alleged herein, and you may consider the evidence of other acts on any matter to which they are relevant.

During the jury instruction conference, Valverde quarreled that the instruction “inferred [his] disposition or propensity to commit the offense” and that there “should be some reference to the prior other acts, or may have committed other acts in the past, or previously so that we are certain that the jury doesn’t assume that the acts that you’re referring to are the ones involved in the information in this case.”

[17] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.<sup>34</sup> Instruction No. 15, when read together with all of the other jury instructions, correctly stated the law, was not misleading, and adequately covered the issues. We find no reversible error in the giving of this instruction.

Valverde contends that the district court should have given the limiting instruction that was given in *Kibbee*.<sup>35</sup> But the *Kibbee* opinion was not released until after the trial in this case. The trial court in *Kibbee* concluded that the prior sexual

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<sup>33</sup> *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

<sup>34</sup> *State v. Kibbee*, *supra* note 2.

<sup>35</sup> *Id.*

assaults could be admitted to show motive, opportunity, preparation, or plan under § 27-404(2), and it instructed the jury as follows:

“The testimony of [the prior victims] relates to [Kibbee’s] commission of other instances of sexual assault or child molestation.

“In a criminal case in which [Kibbee] is accused of an offense of sexual assault, evidence of [Kibbee’s] commission of another offense or offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant including the similarities of the other offenses for the purpose of determining the credibility of [the current victim] or for the purpose of showing [Kibbee’s] motive, opportunity, plan or preparation as it relates to the sexual assault charge. However, evidence of a prior offense on its own is not sufficient to prove [Kibbee] guilty of the crime charged. Bear in mind as you consider this evidence, at all times the State has the burden of proving that [Kibbee] committed each of the elements of the offense charged. I remind you that [Kibbee] is not on trial for any act, conduct or offense not charged in the Information.”<sup>36</sup>

The instruction given was a product of the prosecution’s having adduced evidence under both §§ 27-404 and 27-414. Much of the language contained in the *Kibbee* instruction would not be appropriate here. The district court did not err by failing to give a written limiting instruction similar to that given in *Kibbee*.

[18] Valverde contends that the district court erred in refusing to give his proposed instruction addressing evidence of the prior sexual assaults. To establish reversible error from a court’s refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court’s refusal to give the tendered instruction.<sup>37</sup>

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<sup>36</sup> *Id.* at 99-100, 815 N.W.2d at 894.

<sup>37</sup> *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009).

Valverde's proposed instruction No. 1 provided:

You have heard evidence that [Valverde] may have committed other conduct in addition to the alleged offenses that [have] been charged in the Information.

You are instructed that evidence of conduct by [Valverde], on a previous occasion with witnesses [E.M.] and [H.A.], has been offered by the State for its bearing on any matter to which it is relevant, except for [Valverde's] disposition or propensity to commit the offense that is charged in the Information.

It is entirely up to the jury to determine what weight, if any, such "other conduct" evidence deserves. In reaching your conclusion, you may consider all of the surrounding facts and circumstances of such testimony and give it such weight as you think it is entitled to receive in light of your experience and knowledge of human affairs.

However, you are cautioned that [Valverde] is not on trial here for any conduct or crimes not alleged in the Information. [Valverde] may not be convicted of the offenses charged in the Information if you were to find only that he committed the "other conduct" at some other time. You are reminded that, at all times, the State bears the burden of proving beyond a reasonable doubt that [Valverde] committed the offense charged in the Information.

Valverde's proposed instruction No. 1 would have excluded his propensity to commit the offenses charged in the information—which is precisely the purpose for which § 27-414 was enacted. Because his proposed instruction No. 1 stated that the prior sexual assault evidence could not be considered for his propensity to commit the current offenses, it contained an incorrect statement of law, and the district court did not err in refusing to give it. This is sufficient to resolve the argument on appeal, and we do not address any other aspect of the proposed instruction.

## VI. CONCLUSION

We find no abuse of discretion by the district court in its procedures for determining the admissibility of evidence of Valverde's prior sexual assaults. Because Valverde moved for a mistrial before any evidence of the prior sexual assaults had been adduced, the district court did not abuse its discretion in overruling the motion. Finally, we find no reversible error by the court in the jury instructions that it gave or in the rejection of Valverde's proposed instructions. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

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MID AMERICA AGRI PRODUCTS/HORIZON, LLC, ET AL.,  
RELATORS, V. HONORABLE DONALD E. ROWLANDS,  
JUDGE, DISTRICT COURT FOR LINCOLN COUNTY,  
NEBRASKA, RESPONDENT, AND LANSING TRADE  
GROUP, LLC, AND LANSING ETHANOL  
SERVICES, LLC, INTERVENORS.

835 N.W.2d 720

Filed July 19, 2013. No. S-12-473.

1. **Mandamus.** A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.
2. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
3. **Verdicts: Evidence: Appeal and Error.** Recommended factual findings of a special master have the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence.
4. **Mandamus: Words and Phrases.** A writ of mandamus is issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person.
5. \_\_\_\_: \_\_\_\_\_. Mandamus is a law action and is an extraordinary remedy, not a writ of right.

6. **Attorneys at Law: Expert Witnesses.** The central concern in cases in which counsel has retained a side-switching expert is whether counsel has unfairly obtained confidential information about the opposing party.

Original action. Writ of mandamus denied.

George E. Clough, of Clough Law Office, and Paul H. Schwartz, of Shoemaker, Ghiselli & Schwartz, L.L.C., for relators.

Jay C. Elliott, of Elliott Law Office, P.C., L.L.O., Kirk T. May and Jeremy M. Suhr, of Rouse, Hendricks, German & May, P.C., and William G. Dittrick and Kenneth W. Hartman, of Baird Holm, L.L.P., for intervenor Lansing Trade Group, LLC.

No appearance for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

WRIGHT, J.

### I. NATURE OF CASE

This action presents the question whether a law firm should be disqualified for retaining an expert who, prior to being retained, consulted with opposing counsel on the same matter. Lansing Trade Group, LLC, and Lansing Ethanol Services, LLC (collectively Lansing), commenced an action against Mid America Agri Products/Horizon, LLC, and other defendants (collectively Horizon) over certain “forward corn contracts.” Counsel for Horizon attempted to retain a grain industry expert and conveyed confidential information to him. Lansing’s counsel later retained the same expert. The district court for Lincoln County, Nebraska, the respondent in this proceeding, sustained Horizon’s motion to disqualify the expert from testifying but overruled Horizon’s subsequent motion to disqualify Lansing’s counsel. Horizon filed this original action seeking a writ of mandamus requiring the district court to disqualify Lansing’s counsel. For the following reasons, we deny the writ.

## II. SCOPE OF REVIEW

[1,2] A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law. *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011). The party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

[3] Recommended factual findings of a special master have the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence. See *Larkin v. Ethicon, Inc.*, 251 Neb. 169, 556 N.W.2d 44 (1996).

## III. FACTS

### 1. COMMUNICATIONS WITH HORIZON'S COUNSEL

Lansing brought an action against Horizon in 2009 relating to “forward corn contracts.” Lansing is the plaintiff in the underlying action and the intervenor in the present action. Horizon is the defendant in the underlying action and the relator in the present action. In November 2010, James Nesland, a lead defense attorney for Horizon, contacted Howard J. O’Neil as a possible expert witness for Horizon. They discussed the National Grain and Feed Association (NGFA) Grain Trade Rules.

According to Nesland, O’Neil said he could serve as a defense expert despite being well acquainted with Lansing. Nesland claimed that because of O’Neil’s experience as an expert and willingness to assist the defense, Nesland “reasonably believed that [their] communications were in confidence.” Once O’Neil agreed to be a defense expert, Nesland shared his thoughts, opinions, impressions, and ideas concerning the testimony he believed important regarding the NGFA. He specifically discussed his views about the case.

O'Neil claims he did not recall Nesland's providing him with proprietary information. Nesland received an e-mail from O'Neil dated January 6, 2011, stating that O'Neil did not have time to work on the case. O'Neil recommended another expert, whom he copied on the e-mail, but he had "not shared any of your [proprietary] information with him." Nesland and O'Neil corresponded about another expert Horizon might retain.

After February 2011, Robert Christie, Nesland's cocounsel, undertook primary responsibility for developing Horizon's experts. About 2 months later, Christie contacted O'Neil, and at that time, O'Neil was available to discuss the case on a confidential basis.

During their conversation on May 4, 2011, O'Neil informed Christie that he was not comfortable testifying because of his long-term relationship with a company named "The Andersons," a part owner of Lansing. Christie said that O'Neil had no objection to confidentially acting as a nontestifying consultant and opining on NGFA rules and related issues. Based on assurances from O'Neil that their communications were confidential, Christie discussed confidential information, including his opinion on the issues where O'Neil's expertise was relevant.

O'Neil described the conversation as an "exchange of pleasantries" and a general discussion of NGFA rules. O'Neil said he told Christie he could not consult for him against Lansing. Christie then asked whether O'Neil would be willing to discuss NGFA rules generally, which he agreed to do. O'Neil said he did not remember discussing a company named "The Andersons" and did not believe Christie shared confidential information and did not consider anything in their conversation confidential. O'Neil said Christie told him that Lansing's position was incorrect and that Lansing had not lived up to its contracts. O'Neil understood this to mean Horizon was adverse to Lansing. He did not recall that anyone from Horizon gave him any other impressions or strategies regarding the case.

Christie said that a few days later, he and O'Neil exchanged views and opinions. Christie remembered confirming O'Neil's

agreement to keep information confidential. Following this second conversation, Christie received a \$225 invoice from O'Neil for the May 4, 2011, call. The firm paid the invoice. This was the only invoice O'Neil sent to Horizon. There was no written retention agreement between O'Neil and Horizon.

## 2. COMMUNICATIONS WITH LANSING'S COUNSEL

In November 2011, Kirk May, an attorney for Lansing, spoke to O'Neil to determine if O'Neil was a suitable expert witness. O'Neil believed another lawyer had contacted him regarding the same case. He did not remember the lawyer's name, but "Bob Christie" sounded familiar. O'Neil mentioned a single conversation several months earlier. May believed that Christie would not share confidential information with O'Neil once Christie knew of O'Neil's connection with Lansing. May also expected that if Horizon had retained O'Neil, it would have executed a written retention agreement.

On November 20, 2011, May sent O'Neil a confirmation of his retention as a plaintiff's expert for Lansing. O'Neil confirmed his retention and e-mailed Christie on November 26, saying that he could not assist Horizon in the matter. According to Christie, O'Neil said he could not be a defense expert for Horizon because his connections to Lansing would cause a conflict of interest. However, in an e-mail sent to Christie on November 30, O'Neil recommended potential experts. May did not know until April 2012 that O'Neil was providing Horizon with names of potential experts.

O'Neil proceeded to work for Lansing and provided an expert report. On February 16, 2012, Lansing disclosed O'Neil as an expert witness and provided a copy of O'Neil's report to the defense. Christie claimed this was the first time he knew Lansing had retained O'Neil. The report addressed subject matter he discussed with O'Neil.

On February 20, 2012, a lawyer for Horizon sent May an e-mail stating Horizon's counsel had shared confidential information with O'Neil and paid for his services. On the same day, O'Neil sent May a copy of his November e-mail to Christie stating he could not be an expert for Horizon. This

was the first time O'Neil informed May of this exchange with Christie.

The next day, O'Neil told May that Christie had not shared any confidential information with him. O'Neil claimed that no one acting for Horizon shared defense strategy with him and that he did not have or share confidential information about the defense with May or Lansing's firm.

### 3. TRIAL COURT'S ORDER

Horizon moved to disqualify O'Neil as a witness. The court sustained the motion and disqualified O'Neil from testifying as an expert witness. On April 6, 2012, Horizon moved to reopen discovery to explore whether Lansing's counsel should be disqualified. That motion was overruled. On April 27, Horizon moved to disqualify Lansing's counsel, and the court overruled the motion.

The trial court found that Horizon had been unable to advance any evidence that Horizon's trial strategy, work product, or mental impressions had been communicated by O'Neil to May. It declined to find that May, his firm, and his cocounsel created an appearance of impropriety which would taint the proceedings. It concluded that the remedy which it had already imposed upon Lansing, preventing it from calling O'Neil as an expert witness, was more than sufficient to guarantee Horizon a fair trial.

### 4. MANDAMUS ACTION

Horizon applied for leave to file an original action for a writ of mandamus requiring the district court (hereinafter Respondent) to disqualify Lansing's counsel. Lansing defended the action as an intervenor. We granted leave to file an original action and issued an alternative writ of mandamus requiring the Respondent to disqualify Lansing's counsel or show cause why the writ should not issue.

We appointed a special master. She concluded that O'Neil was not a support person as defined by Neb. Ct. R. of Prof. Cond. § 3-501.9(f). She accepted the finding of the Respondent that a confidential relationship existed and that confidential information had been communicated by Horizon to O'Neil,

but that at no time did O'Neil communicate to Lansing any of the discussions or communications which O'Neil had with Horizon's counsel. The special master found that any presumption of disclosure was rebutted by Lansing and that Lansing's counsel's continued representation did not threaten to taint further proceedings.

She concluded that Horizon failed to establish it had a clear right to the disqualification of Lansing's counsel and failed to establish that Respondent was legally obligated to order disqualification. She also concluded that Respondent did not abuse its discretion in refusing to disqualify Lansing's counsel and that Horizon was not entitled to a writ of mandamus.

#### IV. ASSIGNMENT OF ERROR

Horizon assigns that the trial court erred in overruling its motion to disqualify Lansing's counsel.

#### V. ANALYSIS

##### 1. MANDAMUS

###### (a) Legal Principles

Horizon seeks a writ of mandamus from this court requiring the Respondent to disqualify Lansing's counsel because of its retention of O'Neil as an expert witness. Typically, the denial of a motion to disqualify will be challenged by mandamus. See *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010).

[4,5] The following legal principles apply to an action for writ of mandamus. A writ of mandamus is issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person. *Stetson v. Silverman*, 278 Neb. 389, 770 N.W.2d 632 (2009). Mandamus is a law action and is an extraordinary remedy, not a writ of right. See *id.* A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law. *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011). The party seeking mandamus has the burden of proof

and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *Id.*

(b) § 3-501.9

Attorneys in Nebraska are governed by the Nebraska Rules of Professional Conduct. Section 3-501.9 is applicable to this matter and states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . .

. . . .

(d) A lawyer shall not knowingly allow a support person to participate or assist in the representation of a current client in the same or a substantially related matter in which another lawyer or firm with which the support person formerly was associated had previously represented a client . . . .

(e) If a support person, who has worked on a matter, is personally prohibited from working on a particular matter under Rule 1.9(d), the lawyer or firm with which that person is presently associated will not be prohibited from representing the current client in that matter if:

. . . .

. . . the support person is screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the support person and the firm have a legal duty to protect.

(f) For purposes of Rules 1.9(d) and (e), a support person shall mean any person, other than a lawyer, who is associated with a lawyer or a law firm and shall include but is not necessarily limited to the following: law clerks, paralegals, legal assistants, secretaries, messengers and other support personnel employed by the law firm. Whether one is a support person is to be determined by

the status of the person at the time of the participation in the representation of the client.

A brief history of § 3-501.9 sets the background for our resolution of this matter. Section 3-501.9 developed from a response to Nebraska case law regarding conflicts of interest that arise when lawyers move from one firm to another.

In *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), we disqualified a law firm from representing a defendant. The attorneys in a firm that had represented the plaintiff joined the defendant's firm. We presumed an attorney leaving one firm acquired client confidences while at the firm, regardless of whether the attorney was actually privy to any confidential communications. We also presumed the attorney shared or would share those confidences with members of any firm the lawyer subsequently joined. We held that

when an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation.

*Id.* at 993, 458 N.W.2d at 253.

In *State ex rel. FirstTier Bank*, 244 Neb. 36, 503 N.W.2d 838 (1993), an attorney was employed at a law firm while that firm worked on a case for a defendant. That attorney, and several other attorneys from the firm, formed a new firm with other attorneys. The new firm represented the plaintiffs in an underlying action. The six attorneys from the first firm who were still with the second firm at the time of the proceedings in *Buckley* testified by affidavit that they received no information on the underlying action. We adopted a bright-line rule:

[A]n attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related

to that handled by the former firm while the present attorney was associated with that firm.

*Id.* at 45, 503 N.W.2d at 844.

The year after *Buckley*, this court applied the bright-line rule to a law firm in *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). We held that opposing counsel had to be disqualified after hiring a clerical worker that, unbeknownst to the firm, had worked on the same case as an attorney for an adverse party. We concluded that the hardship worked by this result was outweighed by the need to maintain the confidentiality of communications and avoid the appearance of impropriety.

Following *Hickman*, the Lawyers' Advisory Committee issued Nebraska Ethics Advisory Opinion for Lawyers No. 94-4. The opinion applied the bright-line rule to clerks, paralegals, secretaries, and other ancillary staff members who moved from one law firm to another. The opinion specifically stated that screening was insufficient to avoid disqualification. The opinion had the practical effect of preventing legal offices from hiring administrators, paralegals, law clerks, secretaries, and other ancillary personnel who had worked for legal offices that had or would represent clients adverse to clients of the hiring office. Due to potential conflicts of interest, several law firms ceased hiring law clerks from Nebraska law schools. In response to opinion No. 94-4, the Nebraska State Bar Association petitioned this court to modify Nebraska's Code of Professional Responsibility.

In 1997, this court adopted Canon 5, DR 5-109, of the code. DR 5-109 defined a support person as a person other than a lawyer associated with a lawyer or firm, and expressly included law clerks, paralegals, legal assistants, secretaries, and messengers. The rule prohibited a lawyer from knowingly allowing a support person to assist in the representation of a client if (1) the support person was associated with a firm that represented a materially adverse party in the same or a substantially related matter and (2) the support person acquired confidential information that was material to the matter. Support persons were presumed to have acquired confidential information until they proved otherwise. In September 2005,

DR 5-109 was replaced by § 3-501.9 when Nebraska's Code of Professional Responsibility was replaced by the Nebraska Rules of Professional Conduct.

(c) Parties' Arguments

Horizon claims an irrebuttable presumption applies to an expert who receives confidential information from one party and then works for an adverse party on a substantially related matter. It claims that an irrebuttable presumption must apply to experts because a genuine threat exists that the information conveyed by the first party to the expert will benefit the adverse party. It maintains that even if the information is not disclosed, the expert cannot ignore it while working for the adverse party. Horizon argues there is a substantial risk of one party benefiting from an adverse party's confidential information when an expert is involved, because experts/consultants work on the "substance" of cases.

Lansing claims there is nothing in the record or Nebraska state law supporting the application of an irrebuttable presumption to an expert. It argues that Horizon had no clear right to disqualification and that Respondent had no clear duty to disqualify Lansing's counsel.

(d) Resolution

Two questions are presented by this action: Was O'Neil a support person as defined by § 3-501.9(f) and, if not, should an irrebuttable presumption that O'Neil conveyed confidential information to Lansing's counsel apply? We have not previously considered whether experts are classified as support persons or should be subject to the irrebuttable presumption applied to lawyers. Other jurisdictions have not addressed issues involving support persons, because § 3-501.9(d) through (f) are unique to Nebraska. In defining a "support person," § 3-501.9(f) expressly excludes lawyers. Experts are not expressly addressed by the rule. They are not included as support persons, nor are they excluded. The person's classification as a support person is to be determined by his or her status at the time of the participation in the representation of the client. See *id.*

The term “support person” implies a continuing employment associated with the day-to-day activities of the lawyer or firm. Support persons are not free to perform similar work for other lawyers or firms. Included within this category are law clerks, paralegals, legal assistants, secretaries, messengers, and other support personnel employed by the law firm. See § 3-501.9. Experts, on the other hand, are hired for a particular issue or problem and therefore do not fit into this category. They are independent of the control or authority which is exercised by the firm over its support personnel. Their information and expertise is usually sought for litigation requiring an opinion or testimony concerning a specific issue that requires specialized knowledge or skill. They are similar to independent contractors that are hired for their knowledge or skill to be applied to a specific task. They are not employees of the firm. Since they are hired to testify and give opinions at trial, they remain independent of the employment by the firm. A law clerk or paralegal could not be employed by a firm and also testify as an expert witness for the firm. See, Neb. Ct. R. of Prof. Cond. § 3-503.7(a) (stating “lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness”); Neb. Ct. R. of Prof. Cond. § 3-505.3(b) (stating “lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer”). The expert could not be employed by the firm as a support person and also testify as an expert witness. The special master concluded that O’Neil was not a support person, and we agree.

We next address the presumption that is to be applied to O’Neil as an expert witness. How the rules of professional conduct should be applied is a question of law that we review independent of the conclusions of a respondent and a special master. See *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). Section 3-501.9 distinguishes between lawyers and support persons regarding the application of the presumption of shared confidences.

Our precedents have applied an irrebuttable presumption only to persons who obtained confidential information while

working as lawyers. And for the reasons set forth, we conclude that an irrebuttable presumption of shared confidences shall be applied only to actions involving individuals who obtained confidential information as lawyers.

In *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998), a private attorney who was representing a client in a paternity case hired a law student to do work on a matter not related to the paternity case. The student previously worked for a legal clinic under a supervising attorney at a time when the clinic actively represented an opposing party in the paternity action. The trial court disqualified the clinic's supervising attorney. We reversed the disqualification because there was no evidence that the law student received any confidences from the private attorney regarding the paternity matter. The student could not have shared such confidences with the supervising attorney to warrant disqualifying the supervising attorney. We refused to apply an irrebuttable presumption of shared confidences to the law student. "In the cases where we have applied the irrebuttable presumption of shared confidences, the context has been that of an actual partnership or employment relationship." *Id.* at 290, 576 N.W.2d at 191 (collecting cases concerning attorney relationships).

Other courts have recognized a distinction between lawyers and experts and have not applied an irrebuttable presumption, which is described as a per se vicarious disqualification rule, to a side-switching expert. In *North Pacifica, LLC v. City of Pacifica*, 335 F. Supp. 2d 1045 (N.D. Cal. 2004), the court discussed the substantial differences between the roles played by experts and counsel. Attorneys have an ethical duty to represent and advocate for their clients and are bound by a duty of loyalty. *Id.* Moreover, the practical realities differ between a relationship an attorney has with an expert and that which an attorney has with other attorneys sharing a practice. *Id.* An attorney's disqualification extends to the entire firm, because when attorneys practice together, they presumptively share access to privileged and confidential matters. *Id.* The disqualification rule applied to attorneys "recognizes the everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their client's,

confidential information.’” *Id.* at 1051 (quoting *People v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4th 1135, 980 P.2d 371, 86 Cal. Rptr. 2d 816 (1999)). Vicarious disqualification is necessary to preserve both the confidentiality of client information, as well as public confidence in the legal profession and the judicial process by enforcing the attorney’s duty of undivided loyalty. *Id.* See *City of Santa Barbara v. Superior Court*, 122 Cal. App. 4th 17, 18 Cal. Rptr. 3d 403 (2004).

That same relationship does not exist in the context of retained experts. See *North Pacifica, LLC*, *supra*. Their role is limited. *Id.* They are tasked with providing opinions on specific matters raised in the litigation. See *id.* They do not share the same duty of loyalty to clients. *Id.* There is no sustained relationship in a joint enterprise and common access to and sharing of information as is the case with attorneys sharing a law practice. *Id.*

[6] In *North Pacifica, LLC*, the plaintiff moved to disqualify the defendant’s experts and current counsel. Following a hearing, the court disqualified the experts but did not disqualify the attorneys. The court stated that cases involving vicarious disqualification of the entire law firm were not applicable where the disqualified party is an expert and not a member of the firm. Instead of applying a per se vicarious disqualification rule that is applied to lawyers and law firms, courts have applied a fact-specific test where experts are concerned. The central concern in cases in which counsel has retained a side-switching expert is whether counsel has unfairly obtained confidential information about the opposing party. *Id.* The court set forth the test to be applied when counsel employs a side-switching expert. Under the test, the court determines: (1) Did the expert have confidential information pertaining to the first retaining party’s trial preparation and strategy; (2) did he disclose it to the counsel who subsequently retained the expert; and (3) if so, does counsel’s continued representation threaten to taint all further proceedings? See, *id.*; *Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067, 29 Cal. Rptr. 2d 693 (1994).

In *Shadow Traffic Network*, *supra*, Metro Traffic Control, Inc. (Metro), was a competitor of Shadow Traffic Network

(Shadow Traffic) in the business of traffic reporting. Metro sued Shadow Traffic for various business torts. Attorneys for Metro interviewed members of an accounting firm to discuss retention of the accounting firm as expert witnesses. Metro's counsel informed the accounting firm that the conversation was confidential and proceeded to discuss trial strategies and theories. The accounting firm was ultimately not retained by Metro. A few weeks later, attorneys for Shadow Traffic met with two of the same accountants. The accountants told Shadow Traffic that Metro's attorneys had interviewed the firm for the same purpose of testifying as an expert, but had decided not to retain it. An attorney for Shadow Traffic spoke with another accountant who had discussed the case with Metro's counsel. Shadow Traffic then retained the accountant as a testifying expert and disclosed to Metro they had done so.

The trial court sustained Metro's motion to recuse Shadow Traffic's attorneys. The appellate court articulated a test similar to the test in *North Pacifica, LLC v. City of Pacifica*, 335 F. Supp. 2d 1045 (N.D. Cal. 2004).

"The party seeking disqualification must show that its present or past attorney's former employee possesses confidential attorney-client information materially related to the proceedings before the court. . . . Once this showing has been made, a rebuttable presumption arises that the information has been used or disclosed in the current employment. . . ."

*Shadow Traffic Network*, 24 Cal. App. 4th at 1084-85, 29 Cal. Rptr. 2d at 703 (quoting *In re Complex Asbestos Litigation*, 232 Cal. App. 3d 572, 283 Cal. Rptr. 732 (1991)). The test served to "implement the important public policy of protecting against the disclosure of confidential information and the potential exploitation of such information by an adversary." *Shadow Traffic Network*, 24 Cal. App. 4th at 1085, 29 Cal. Rptr. at 703.

Using the test described in *North Pacifica, LLC*, the special master proceeded to determine whether O'Neil obtained confidential information from Horizon's counsel and, if he did, whether he disclosed such information to Lansing's counsel. Implicit in the test applied by the special master was the

finding by the Respondent that Horizon reasonably believed that the information it conveyed to O'Neil would be kept confidential. We approve the special master's use of this test. A rebuttable presumption of shared confidences should be applied to a side-switching expert. The party requesting a disqualification of counsel that subsequently retained the expert must establish that it reasonably believed that information it conveyed to the expert would be kept confidential and that it conveyed confidential information to the expert. If this is shown, the presumption arises that this information was conveyed by the expert to counsel that subsequently retained the expert. Counsel must rebut this presumption by proving that he or she did not receive confidential information from the expert. If the presumption is not rebutted, the court should determine whether continued representation by counsel will taint further proceedings.

Horizon had the initial burden to show that it reasonably believed that information conveyed to O'Neil would be kept confidential and that it had conveyed confidential information to O'Neil. When Horizon made this showing, it created the rebuttable presumption that O'Neil conveyed the confidential information to counsel for Lansing. To rebut this presumption, Lansing's counsel had to prove that O'Neil did not convey the confidential information to counsel for Lansing.

The special master accepted the factual findings of the Respondent that O'Neil and Horizon had a confidential relationship and O'Neil had confidential information which was conveyed to him by Horizon, but that at no time did O'Neil communicate to Lansing's counsel any of the confidential information. And Horizon's counsel had not advanced any evidence that its trial strategies, work product, or mental impressions had been communicated by O'Neil to Lansing's counsel.

We review the findings of the special master to determine whether such findings are clearly against the weight of the evidence. Recommended factual findings of a special master have the effect of a special verdict, and the report upon questions of fact, like the verdict of a jury, will not be set aside unless clearly against the weight of the evidence. See

*Larkin v. Ethicon, Inc.*, 251 Neb. 169, 556 N.W.2d 44 (1996). The special master's finding that O'Neil did not convey the confidential information to Lansing's counsel was not clearly against the weight of the evidence.

Horizon has not shown clearly and convincingly that the Respondent had a legal obligation to disqualify Lansing's counsel. Horizon is not entitled to a writ of mandamus. See *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011).

## 2. DISTRICT COURT'S ORDER DISQUALIFYING O'NEIL

We address one remaining issue, because it is necessary for complete resolution of this matter. The Respondent "sustain[ed] the Motion to Disqualify . . . O'Neil . . . from testifying as an expert witness." The order prohibited O'Neil from testifying but did not expressly prohibit him from consulting with Lansing.

The special master concluded that continued representation by Lansing's counsel did not threaten to taint further proceedings, because O'Neil was disqualified as a testifying expert. The Respondent accepted the testimony of Nesland and Christie that they reasonably believed they had established a confidential relationship with O'Neil and that O'Neil received confidential information. It accepted the testimony of May that O'Neil had not conveyed confidential information to him. O'Neil was disqualified from testifying as an expert witness to protect Horizon's confidential information. If, following his disqualification, O'Neil were to consult with Lansing as a nontestifying expert, the proceedings would be tainted. Therefore, we conclude the order implicitly prohibits all further contact by O'Neil with Lansing and its counsel and disqualifies O'Neil from any further participation in this matter from and after the date of the disqualification order of March 30, 2012.

## VI. CONCLUSION

There is a rebuttable presumption that O'Neil shared confidences gained from Horizon's counsel with Lansing's counsel.

Lansing rebutted this presumption, because the special master determined that O’Neil had not communicated Horizon’s confidential information to Lansing’s counsel. This finding is not clearly against the weight of the evidence. We adopt this finding, and conclude that because O’Neil did not share confidential information with Lansing or Lansing’s counsel, disqualification of Lansing’s counsel is not required. Horizon’s application for a writ of mandamus is denied.

WRIT OF MANDAMUS DENIED.

MILLER-LERMAN, J., not participating.

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PINNACLE ENTERPRISES, INC., APPELLANT AND CROSS-APPELLEE,  
v. CITY OF PAPILLION, A MUNICIPAL CORPORATION,  
APPELLEE AND CROSS-APPELLANT.

836 N.W.2d 588

Filed July 26, 2013. No. S-12-385.

1. **Judgments: Jurisdiction.** Jurisdictional questions that do not involve a factual dispute present questions of law.
2. **Statutes: Judgments: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
3. **Jurisdiction: Appeal and Error.** An appellate court has a duty to raise and determine any jurisdictional issue of its own accord.
4. **Jurisdiction: Time: Appeal and Error.** A party has only 30 days to appeal from a final order, and a party’s failure to timely appeal from a final order prevents an appellate court from exercising jurisdiction over the issues raised and decided in that order.
5. **Eminent Domain.** Condemnation proceedings are special proceedings.
6. **Actions.** A “claim for relief” under Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) is equivalent to a separate cause of action.
7. **Eminent Domain: Parties: Appeal and Error.** In a condemnation action, because a district court appeal is a de novo proceeding, which contemplates the filing of pleadings and the framing of issues, no longer is the condemnee automatically the plaintiff in the district court proceeding. Rather, who the plaintiff is depends on who appeals first from the appraisers’ award.

Appeal from the District Court for Sarpy County: DANIEL E. BRYAN, JR., Judge. Affirmed.

Paul F. Peters, P.C., L.L.O., for appellant.

Michael N. Schirber, of Schirber & Wagner, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

### SUMMARY

The City of Papillion (City) condemned property owned by Pinnacle Enterprises, Inc. (Pinnacle), for the City's Schram Road project. The project connected various streets by building a new road and accompanying fixtures on Pinnacle's former property. Along with the road, the City built an iron fence on the north side of the new road, which abutted Pinnacle's remaining property. Pinnacle alleges that (1) the City lacked statutory authority to condemn the property for the fence and, alternatively, (2) the City imposed a second taking by building the fence and limiting its access to the new road. Because Pinnacle failed to timely appeal those issues, we do not reach them.

The City cross-appealed, alleging that the district court erred in granting Pinnacle interest, fees, expenses, and costs because the jury verdict did not exceed the City's prior offer to confess judgment. We conclude that the court correctly applied the statutes at issue and properly awarded Pinnacle interest, fees, expenses, and costs. We affirm.

### BACKGROUND

The City wanted some of Pinnacle's land for a project to "redesign[], relocat[e] and mak[e] improvements to Schram Road . . . including paving, grading, curbing, integral storm sewers, decorative lighting and other necessary appurtenant improvements." The City intended to build a new road, as an extension of the then-existing Schram Road, to connect several arterial streets. Because Pinnacle and the City could not agree, the City decided to condemn the property.

In its initial filing in county court, the City set out the property it sought to condemn, its authority to do so, the purpose for the condemnation, and the parties' failure to reach an agreement. The City sought to acquire some property in

fee simple (upon which the fence was eventually built), but sought only temporary and permanent easements (for grading and storm sewers) in other property. The county court later appointed appraisers to assess the damages of the proposed taking. The appraisers awarded Pinnacle \$344,215.15. Pinnacle appealed to the district court, initially alleging only that the appraisers' award was insufficient.

The City offered to confess judgment for \$500,000,<sup>1</sup> which Pinnacle refused. Before trial, Pinnacle filed what it termed its "Dispositive Pre-trial Motions." Those motions essentially claimed—in addition to the insufficiency of the appraisers' award—that the condemnation was void because the City (1) failed to negotiate in good faith and (2) lacked statutory authority to condemn Pinnacle's property for the fence. The parties agreed to try these issues to the court and reserve the sufficiency of the appraisers' award for a later jury trial.<sup>2</sup> Later, Pinnacle amended its petition to include these issues.

At the bench trial, Pinnacle argued that the easements were fatally vague, that the City lacked authority under Neb. Rev. Stat. § 19-709 (Reissue 2012) to condemn its property for a fence, that the City had not negotiated in good faith, and that the City had worked a second taking on Pinnacle by erecting the fence. The court found otherwise:

[T]he City . . . did negotiate in good faith with Pinnacle . . . prior to the City['s] filing eminent domain proceedings in the County Court . . . .

. . . [T]he fence referenced in [Pinnacle's] Dispositive Pre-Trial Motions, does not constitute a second eminent domain taking and the Court specifically finds against [Pinnacle] and in favor of the [City] on all issues raised by [Pinnacle's] Dispositive Pre-trial Motions . . . .

Pinnacle did not appeal this order.

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<sup>1</sup> See Neb. Rev. Stat. §§ 25-901 and 25-906 (Reissue 2008).

<sup>2</sup> See, *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998); *Moody's Inc. v. State*, 201 Neb. 271, 267 N.W.2d 192 (1978); *Suhr v. City of Seward*, 201 Neb. 51, 266 N.W.2d 190 (1978). See, also, *Krupicka v. Village of Dorchester*, 19 Neb. App. 242, 804 N.W.2d 37 (2011).

Before proceeding to a jury trial on the appraisers' award, the City again offered to confess judgment for \$500,000. Pinnacle refused that offer. At the jury trial, both parties presented evidence, including expert testimony, on the damages suffered. The jury awarded \$432,661 in damages.

Following the jury trial, the court awarded Pinnacle interest, attorney and expert witness fees, expenses, and costs. In its order, the court determined that under Neb. Rev. Stat. § 76-711 (Reissue 2009), Pinnacle was entitled to \$99,159.22 in interest because the jury's verdict exceeded the appraisers' award. The court then determined that because the jury verdict exceeded the appraisers' award by more than 15 percent, under Neb. Rev. Stat. § 76-720 (Reissue 2009), the court awarded Pinnacle \$100,369.80 in attorney fees and \$9,900 in expert witness fees. And the court awarded Pinnacle \$1,419.50 in deposition expenses. The court also determined that the jury verdict and interest exceeded the City's \$500,000 offer to confess judgment, so the court awarded Pinnacle costs.

### ASSIGNMENTS OF ERROR

Pinnacle assigns, restated, that the court erred in concluding that (1) the City had statutory authority to condemn the property for the fence and (2) the City's building of the fence was not a second taking that limited Pinnacle's access to the new road.

On cross-appeal, the City assigns, reordered and restated, that the court erred in (1) granting Pinnacle interest because the jury verdict did not exceed the City's \$500,000 offer to confess judgment and (2) granting Pinnacle fees, expenses, and costs because the jury verdict did not exceed the City's \$500,000 offer to confess judgment by more than 15 percent.

### STANDARD OF REVIEW

[1] Jurisdictional questions that do not involve a factual dispute present questions of law.<sup>3</sup>

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<sup>3</sup> See, e.g., *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

[2] The meaning and interpretation of a statute are questions of law.<sup>4</sup> We independently review questions of law decided by a lower court.<sup>5</sup>

## ANALYSIS

### FINAL ORDER

[3,4] Although neither party raised or discussed whether the court's order resolving the issues addressed in the bench trial was a final, appealable order, an appellate court has a duty to raise and determine any jurisdictional issues of its own accord.<sup>6</sup> A party has only 30 days to appeal from a final order,<sup>7</sup> and a party's failure to timely appeal from a final order prevents an appellate court from exercising jurisdiction over the issues raised and decided in that order.<sup>8</sup>

Here, Pinnacle filed its appeal on May 2, 2012 (within 30 days of judgment on the jury verdict), but the issues that Pinnacle raised on appeal—whether the City had authority under § 19-709 to condemn its property for the fence and whether construction of the fence was a second taking—were resolved by the court's order on January 27. The issue is whether that order was a final, appealable order. We issued an order to show cause to the parties to give them an opportunity to respond to the order. After receiving and considering their responses, we conclude that the January order was final, that Pinnacle failed to timely appeal the issues it now raises, and that we are without jurisdiction to address those issues.

[5] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders are (1) an order which affects a

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<sup>4</sup> See, e.g., *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012); *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011).

<sup>5</sup> See, e.g., *Beveridge v. Savage*, 285 Neb. 991, 830 N.W.2d 482 (2013).

<sup>6</sup> See, e.g., *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

<sup>7</sup> See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

<sup>8</sup> See, *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009); *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989). Cf. *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013).

substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.<sup>9</sup> Here, only the second type of final order—an order affecting a substantial right made during a special proceeding—is at issue. We have long held that condemnation proceedings are special proceedings.<sup>10</sup> So whether the court’s January 2012 order was a final order—and thus whether Pinnacle should have appealed it—depends on whether that order affected a substantial right of Pinnacle.

The meaning of a “substantial right” is somewhat vague. We have stated that a substantial right is an essential legal right, not a mere technical right.<sup>11</sup> We have also stated that a substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant before the order from which the appeal is taken.<sup>12</sup>

We turn now to the court’s order and whether it affected a substantial right. The order denied Pinnacle’s “Dispositive Pre-Trial Motions,” which argued, among other things, that the City lacked statutory authority under § 19-709 “to use eminent domain to acquire right-of-way for a fence” and that the City’s “construction of such fence amounted to a second taking and subsequent condemnation of [Pinnacle’s] property.” We will address each ruling in turn.

The court’s ruling that the City had statutory authority to condemn the property for the construction of a fence was a final, appealable order. This conclusion flows from our reasoning in *SID No. 1 v. Nebraska Pub. Power Dist.*<sup>13</sup> In

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<sup>9</sup> See, e.g., *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

<sup>10</sup> See, e.g., *SID No. 1*, *supra* note 2; *Higgins v. Loup River Public Power Dist.*, 159 Neb. 549, 68 N.W.2d 170 (1955); *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951).

<sup>11</sup> See, e.g., *SID No. 1*, *supra* note 2.

<sup>12</sup> See *id.*

<sup>13</sup> *Id.*

that consolidated case, the condemnor sought to condemn two parcels of land in which the condemnee had an interest. The appraisers entered awards for the condemnee, which it appealed to the district court. In its amended petitions on appeal, the condemnee alleged, among other things, that “the subject parcels were public property over which [the condemnee] had no statutory power of eminent domain and prayed that the court declare the attempted condemnation void.”<sup>14</sup> The court held a bench trial solely on this issue, “reserving for later determination other issues, including the adequacy of damages awarded by the appraisers.”<sup>15</sup> When the court held that the condemnor had authority to condemn the property, the condemnee appealed.<sup>16</sup>

We first addressed whether the orders were final, because other issues—including the adequacy of the damages—were still pending before the court. We noted that whether the orders were final depended on whether they qualified under one of the three categories enumerated in § 25-1902. Because a condemnation proceeding was a special proceeding, we asked only whether the orders affected a substantial right. We noted that “[a] substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.”<sup>17</sup> And because the orders “eliminated what [the condemnee] alleged to be a complete defense to condemnation,” they affected a substantial right and the orders were final and appealable.<sup>18</sup>

Similarly, the court’s order here eliminated what Pinnacle alleged to be a defense to condemnation—that the City had no authority to condemn property for construction of a fence. And although Pinnacle did not allege that such a finding would

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<sup>14</sup> *Id.* at 920, 573 N.W.2d at 464.

<sup>15</sup> *Id.*

<sup>16</sup> See *SID No. 1*, *supra* note 2.

<sup>17</sup> *Id.* at 921, 573 N.W.2d at 465.

<sup>18</sup> *Id.*

necessarily render the whole condemnation void (it focused on removing the fence), that would be its effect; a finding that a portion of the taking was unlawful would require a “do-over” of the condemnation proceeding. This is because the initial appraisers’ award valued the entire taking; if that award encompassed property which should not have been included, then the award would be inaccurate. This would affect the district court appeal because the court determines the award of interest, fees, expenses, and costs by comparing the jury’s assessment of damages and the appraiser’s award.<sup>19</sup> So, concluding that part of a taking is void renders the whole taking void because the proceeding must begin anew. We conclude that the court’s ruling that the City had authority under § 19-709 to condemn Pinnacle’s property for the construction of a fence was a final, appealable order. Pinnacle did not timely appeal that order, and we are precluded from addressing the issue now.

The court’s ruling that the City’s construction of the fence was not a second taking was also a final, appealable order. We read the court’s order as concluding that the construction of the fence was simply not a taking. This reading is supported by various portions of the bill of exceptions and by the court’s later ruling that Pinnacle was foreclosed from adducing evidence of its purported damages from the fence’s construction (which the court would have allowed had it considered it to be a taking involved in the current condemnation proceeding).

Remember, “[a] substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.”<sup>20</sup> The court’s order meant that Pinnacle could not adduce evidence of any purported damage from the City’s building of the fence in the present proceeding. Notably, too, it meant that Pinnacle was

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<sup>19</sup> See §§ 76-711 and 76-720.

<sup>20</sup> *SID No. 1*, *supra* note 2, 253 Neb. at 921, 573 N.W.2d at 465.

effectively foreclosed from bringing a subsequent inverse condemnation proceeding, which Pinnacle sought to do, because the court ruled it was not a taking. This order affected a substantial right, and so it was a final order from which Pinnacle failed to timely appeal. We are precluded from addressing the issue now.

We note briefly that Pinnacle, in its response to our order to show cause, argued that the January 2012 order was not final because the order did not comply with Neb. Rev. Stat. § 25-1315(1) (Reissue 2008). That section states, in relevant part:

When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Pinnacle argues that because it presented multiple claims for relief (which were not all resolved), and because the court did not expressly state that the January order was final, it was not a final order.

[6] But § 25-1315(1) does not apply here because there are not multiple “claim[s] for relief” within the meaning of § 25-1315(1). We have explained, in prior cases, that a “claim for relief” under § 25-1315(1) is equivalent to a separate cause of action.<sup>21</sup> A cause of action “consists of the fact or facts which give one a right to judicial relief against another . . . . Two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories . . . and not separate causes of action.”<sup>22</sup> Here, there was but one cause of action and therefore only one “claim for relief” under § 25-1315(1).

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<sup>21</sup> See, e.g., *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

<sup>22</sup> *Saunders County v. City of Lincoln*, 263 Neb. 170, 174, 638 N.W.2d 824, 827 (2002).

CROSS-APPEAL

As our appellate rules explain, “[t]he proper filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal. The cross-appeal need only be asserted in the appellee’s brief as provided by § 2-109(D)(4).”<sup>23</sup> The City properly asserted its cross-appeal in its brief.

The City disagrees with the court’s award of interest, fees, expenses, and costs to Pinnacle. The City claims that the court erred in entering the award because the jury verdict did not exceed the City’s prior offer to confess judgment. But the initial question is whether the City could offer to confess judgment. We conclude that it could not and, furthermore, that the court’s award of interest, fees, expenses, and costs was proper.

Both §§ 25-901 and 25-906 relate to offers to confess judgment. Section 25-901 is applicable here, rather than § 25-906, because the offer to confess judgment did not come “in court” under § 25-906 but through an “offer in writing” under § 25-901. Section 25-901 states, in relevant part:

The defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for the sum specified therein. . . . If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant’s cost from the time of the offer.

The question is whether § 25-901 applies in a condemnation proceeding.

We take this opportunity to clarify the status of the parties in the district court appeal of a condemnation proceeding. Initially, as the condemnor is the party initiating the proceeding, the condemnor is the plaintiff and the condemnee is the defendant at the county court level. But this can change at the district court level. Under prior versions of Neb. Rev. Stat. § 76-717 (Reissue 2009), no matter who appealed from the

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<sup>23</sup> Neb. Ct. R. App. P. § 2-101(E) (rev. 2010).

appraisers' award, the condemnee was always denominated as "the plaintiff" and the condemnor was always denominated as "the defendant."<sup>24</sup>

[7] This changed in 1995 when the Legislature removed that language and substituted the following: "The first party to perfect an appeal shall file a petition on appeal in the district court . . . ."<sup>25</sup> The change was meant to place the onus of filing a petition on the party who was appealing the appraisers' award rather than always requiring the condemnee to do so.<sup>26</sup> And because the district court appeal is a "de novo" proceeding,<sup>27</sup> which contemplates the "'filing of pleadings and the framing of issues,'"<sup>28</sup> no longer is the condemnee automatically the plaintiff in the district court proceeding. Rather, who the plaintiff is depends on who appeals first from the appraisers' award. So on appeal, the City was the defendant.

We give statutory language its plain and ordinary meaning.<sup>29</sup> Section 25-901 provides that "[t]he defendant" may offer to confess judgment. The statute also provides that the defendant may do so "in an action for the recovery of money only." While the City is the defendant in this condemnation proceeding, such a proceeding is not "for the recovery of money only." As such, the City's offer to confess judgment was invalid.

Here, the proceeding was a condemnation proceeding commenced by the City against Pinnacle. A condemnation proceeding is "the exercise of eminent domain by a governmental

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<sup>24</sup> See, 1961 Neb. Laws, ch. 369, § 2, p. 1142; 1973 Neb. Laws, L.B. 226, § 29; 1983 Neb. Laws, L.B. 270, § 1; *Dawson v. Papio Nat. Resources Dist.*, 210 Neb. 100, 313 N.W.2d 242 (1981); *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975).

<sup>25</sup> § 76-717; 1995 Neb. Laws, L.B. 222.

<sup>26</sup> See Floor Debate, L.B. 222, Judiciary Committee, 94th Leg., 1st Sess. 1166-68 (Feb. 10, 1995).

<sup>27</sup> § 76-717.

<sup>28</sup> *Armstrong v. County of Dixon*, 282 Neb. 623, 632, 808 N.W.2d 37, 44 (2011).

<sup>29</sup> See, e.g., *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

entity.”<sup>30</sup> Eminent domain is “[t]he inherent power of a governmental entity to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking.”<sup>31</sup> In other words, the condemnation proceeding in this case was a proceeding for the recovery of land, not money.

The proceeding does not change simply because Pinnacle appealed the appraisers’ award to the district court. It is true that the district court proceeding is a *de novo* proceeding which contemplates the filing of pleadings and the framing of issues.<sup>32</sup> But it is not a new proceeding. We recognized this in *Wooden v. County of Douglas*,<sup>33</sup> when we explained that “the [condemnee’s] petition on appeal . . . was not the commencement of a new action, but simply a continuation of the condemnation action filed by the County.”<sup>34</sup> And, as noted above, a condemnation proceeding is not “for the recovery of money only.” Section 25-901 does not apply, and so the City’s offer to confess judgment was invalid.

Because § 25-901 is inapplicable here, the issues regarding interest, fees, expenses, and costs are straightforward. Under § 76-711, the court properly awarded interest to Pinnacle. Section 76-711 states: “If an appeal is taken from the award of the appraisers by the condemnee and the condemnee obtains a greater amount than that allowed by the appraisers, the condemnee shall be entitled to interest . . . .” Here, Pinnacle obtained a “greater amount” from the jury than that allowed by the appraisers, so the court correctly awarded interest to Pinnacle.

Under § 76-720, the court also properly awarded attorney and expert witness fees to Pinnacle. Section 76-720 states:

If an appeal is taken from the award of the appraisers by the condemnee and the amount of the final judgment

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<sup>30</sup> Black’s Law Dictionary 332 (9th ed. 2009).

<sup>31</sup> *Id.* at 601.

<sup>32</sup> See *Armstrong*, *supra* note 28.

<sup>33</sup> *Wooden v. County of Douglas*, 275 Neb. 971, 751 N.W.2d 151 (2008).

<sup>34</sup> *Id.* at 977, 751 N.W.2d at 156. Cf. *Armstrong*, *supra* note 28.

is greater by fifteen percent than the amount of the award, . . . the court may in its discretion award to the condemnee a reasonable sum for the fees of his or her attorney and for fees necessarily incurred for not more than two expert witnesses.

The court awarded such fees, and we find no abuse of discretion.

The district court also awarded “costs” to Pinnacle. From the court’s order, we read “costs” to include the deposition expenses for \$1,419.50. We have treated such expenses as costs in the past.<sup>35</sup> Unlike interest and fees, however, the eminent domain statutes do not expressly allow the court to award costs when the condemnee appeals the appraisers’ award and obtains a greater amount from the jury. Nevertheless, the court’s award of costs was proper under our case law.<sup>36</sup>

### CONCLUSION

We conclude that the court’s January 2012 order was a final order from which Pinnacle failed to timely appeal. We also conclude that the City’s offer to confess judgment was invalid and that the court’s award of interest, fees, expenses, and costs was proper.

AFFIRMED.

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<sup>35</sup> See, e.g., *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

<sup>36</sup> *Keller v. State*, 184 Neb. 853, 172 N.W.2d 782 (1969).

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STATE OF NEBRASKA, APPELLEE, v.  
ARMON M. DIXON, APPELLANT.

837 N.W.2d 496

Filed July 26, 2013. No. S-12-525.

1. **Motions for Mistrial: Appeal and Error.** Whether to grant a motion for mistrial is within the trial court’s discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.

2. **Identification Procedures: Due Process: Appeal and Error.** A trial court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.
3. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
4. \_\_\_\_: \_\_\_\_\_. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
6. **Criminal Law: Trial.** The general rule is that a defendant who is on trial should be free from shackles unless they are necessary to prevent violence or escape.
7. **Motions for Mistrial: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial. Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
8. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence presented; such matters are for the finder of fact.
9. **Prior Convictions: Proof.** In a proceeding to enhance punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.
10. **Sentences: Prior Convictions: Habitual Criminals: Proof.** In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.
11. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
12. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

13. **Sentences.** It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In April 2009, an armed man forced his way into the apartment of J.K. and sexually assaulted her over a 10-hour period. He then took her cell phone and left the apartment. Armon Dixon was eventually arrested and charged in the district court for Lancaster County with first degree sexual assault, use of a weapon to commit a felony, and robbery. He was convicted on all charges by a jury and subsequently was determined to be a habitual criminal. Dixon was sentenced to a total of 80 to 140 years in prison. He appeals.

### I. FACTS

J.K., a full-time student, lived in an apartment in Lincoln, Nebraska, with her 3-year-old son. Around 8 p.m. on April 23, 2009, she went to a gas station for cigarettes. She returned about 8:45 p.m. and went on the balcony of her apartment to smoke. About 9 p.m., J.K. answered a knock on the apartment door and a man forced his way into the apartment. After they struggled for 2 to 3 minutes, the man displayed a handgun. He threatened to kill her and her son if they were not quiet. She took her son to his bedroom, and the man followed her there.

The man then followed J.K. to her bedroom. By that time, he was wearing a light brown homemade mask with holes cut out for the eyes and the mouth. He forced her to remove her clothes and then blindfolded her, using the tank top she had

been wearing. During the next 10 hours, the man sexually assaulted J.K. at least six times. Prior to the first assault, J.K. heard the sounds of a paper sack, a wrapper being opened, and a zipper being unzipped.

The man forced J.K. to clean herself after each assault. He also removed the bedding after each assault. J.K. was not blindfolded the entire time and at one point noticed that the man had a large black garbage bag. The man told her he had been watching her earlier that evening, and he again threatened to kill J.K. and her son if she reported his actions.

At one point, the man used a gray T-shirt to blindfold J.K. and threatened both her and her son with a kitchen knife. J.K. believed the man was wearing a condom each time there was sexual penetration. She testified she had no condoms in her apartment.

After one assault, the man lay next to J.K. on the bed and asked her personal questions about her family and whether she had a boyfriend, as he ran the knife up and down the side of her body. During this time, J.K. saw that the mask was pulled up over the man's head and she could see his face.

J.K. eventually could hear birds chirping outside, and she told the man her neighbors got up at 6 or 7 a.m. After assaulting her one final time, he made her use toilet bowl cleaner in the sink, bathtub, and toilet. He then blindfolded her and led her into her son's room. He then directed her to lie on the floor face down and count to 200 or 300 before getting up. Eventually, J.K. heard the front door open and close, the rustling of plastic sacks, and then another door close.

J.K. got up and locked the front door and then checked all the rooms and closets to make sure the man was gone. The man took her cell phone. After changing clothes and dressing her son, J.K. drove to her parents' home in a nearby town.

J.K.'s father called police, who directed her to go to a hospital for an examination. J.K. gave a telephonic statement to police the following day. She described her assailant as a black male with "kind of bushy" hair. She said he was "scruffy looking" and about 5 feet 11 inches or 6 feet tall. He was wearing jeans, a black hooded sweatshirt, and latex gloves. J.K. said she saw the man while they were face to face as they

struggled at the door. During that time, the kitchen light was on and there was light coming from the television. J.K. later identified Dixon as the assailant after viewing a photographic array compiled by the Lincoln Police Department.

The police investigation into the assault showed that Dixon's sister lived in the same apartment building as J.K. A red Oldsmobile, which was registered to Dixon's mother and sometimes driven by Dixon, was towed from the apartment complex parking lot the week of April 24, 2009. A white 2000 Cadillac which was registered to Dixon was found in the apartment complex parking lot on May 3. On May 12, police searched the sister's apartment. They found unused condoms in a black trash bag in a bedroom closet and in a plastic storage tub in the living room. Officers also found a bill addressed to Dixon at that address. Dixon's sister testified that he lived with her 4 or 5 days each week. She testified that she was ill and did not work on April 23 and 24. She saw Dixon around 11:30 p.m. on April 23, but did not see him on the morning of April 24.

In April 2009, Dixon had two jobs. He worked during the day at Concrete Industries and part time in the evenings at Snyder Industries. He had access to latex gloves at both jobs. Snyder Industries had a plant in Lincoln on North 63d Street and another on Fremont Street. Time records indicated that Dixon clocked in to work at the North 63d Street plant at 5:58 p.m. on April 23. He clocked out at 6:16 p.m. and clocked in at the plant on Fremont Street at 6:24 p.m. He was clocked out at 11 p.m. That punch at 11 p.m. was added by a supervisor at 8:32 a.m. the next day. Dixon's supervisor testified that if an employee had problems with the timeclock or forgot to clock out, the supervisor could manually override the system the next day. The supervisor testified that he authorized vacation for Dixon from April 27 to May 1 after Dixon called on April 23 and left a message that he had to be with his sister in Chicago, Illinois.

Records for a cell phone that belonged to Dixon showed that the phone was used to check voice mail at 8:16 p.m. on April 23, 2009. The cell tower the call went through indicates it was placed in the area of the Fremont Street plant. Another

call to voice mail was made from that phone number at 11:32 p.m. It went through a cell tower that had a coverage area encompassing the location of J.K.'s apartment. The next call made from the same phone was to check voice mail at 8:15 a.m. on April 24. A number of calls made between 10 and 11:15 a.m. on April 24 all went through the same cell tower near J.K.'s apartment. A record of text messages on the phone showed one at 9:13 p.m. on April 23 and one at 12:03 a.m. on April 24.

A gray T-shirt was collected by a nurse when J.K. went to the hospital on April 24, 2009. DNA from the T-shirt was determined to be from a "single-source male." Dixon was excluded as a possible contributor of the DNA on the T-shirt. DNA tests were also completed on fingernail scrapings obtained from J.K. Dixon was not excluded as a possible contributor of DNA found in those scrapings.

Dixon testified that in April 2009, he stayed at the apartment of either his girlfriend, his mother, or his sister. He stated that he did not work at Concrete Industries on April 23, but he did work at Snyder Industries, checking in at 5:58 p.m. and out at 11 p.m. He said he went to his sister's apartment after work. On Friday, April 24, he went to Snyder Industries to ask for vacation time, and his supervisor told Dixon he had failed to punch out the night before. Dixon denied going to J.K.'s apartment, assaulting her, or holding her captive.

The jury found Dixon guilty of first degree sexual assault, use of a weapon to commit a felony, and robbery. The court found him to be a habitual criminal. Dixon was sentenced to terms of imprisonment of 35 to 60 years for first degree sexual assault, 35 to 60 years for use of a weapon to commit a felony, and 10 to 20 years for robbery. All sentences were ordered to be served consecutively.

## II. ASSIGNMENTS OF ERROR

Dixon assigns, restated, that the district court erred in (1) failing to grant his motion for mistrial on the basis that prospective jurors may have seen him in visible restraints during voir dire; (2) failing to grant his motion for mistrial on the

basis that the State elicited testimony from a police officer that violated the court's order prohibiting the presentation of evidence under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2012); (3) failing to sustain his motion to suppress evidence of identification and in subsequently admitting said evidence; (4) failing to sustain his motion for a directed verdict at the conclusion of all evidence; (5) determining he was a habitual criminal when the State did not provide sufficient proof of the proffered prior convictions; (6) applying the penalty provision of Neb. Rev. Stat. § 29-2221(1)(a) (Reissue 2008) based upon a purported prior conviction for aiding and abetting first degree assault; and (7) imposing excessive sentences.

### III. STANDARD OF REVIEW

[1] Whether to grant a motion for mistrial is within the trial court's discretion, and this court will not disturb its ruling unless the court abused its discretion.<sup>1</sup>

[2] A trial court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.<sup>2</sup>

[3,4] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.<sup>3</sup> An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.<sup>4</sup>

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<sup>1</sup> *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013); *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

<sup>2</sup> *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 158, 184 L. Ed. 2d 78.

<sup>3</sup> *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

<sup>4</sup> *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013); *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

## IV. ANALYSIS

### 1. MOTIONS FOR MISTRIAL

[5] We first consider Dixon's argument that the district court erred in overruling his two motions for mistrial. The first motion was based on a contention that prospective jurors may have seen him wearing leg restraints during voir dire examination, and the second motion was based on the contention that the State elicited inadmissible testimony from a police officer. A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.<sup>5</sup> As noted, we review an order overruling a motion for mistrial for abuse of discretion.<sup>6</sup>

#### (a) First Motion for Mistrial

During jury selection, Dixon's counsel moved for a mistrial on the ground that prospective jurors may have seen Dixon in leg restraints while he was seated at the counsel table. Counsel chose not to inquire of prospective jurors whether they had in fact seen the restraints. The prosecutor argued that prospective jurors could not have seen the restraints because a cart blocked their view, but Dixon disputed this. After personally assessing the prospective jurors' view of Dixon, the court overruled the motion but requested that transport officers remove the leg shackles and replace them with a leg brace.

[6] The general rule is that a defendant who is on trial should be free from shackles unless they are necessary to prevent violence or escape.<sup>7</sup>

This is because it is central to the right to a fair trial, guaranteed by the 6th and 14th Amendments, that one accused of a crime is entitled to have his or her guilt or

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<sup>5</sup> *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

<sup>6</sup> *State v. Watson*, *supra* note 1; *State v. Scott*, *supra* note 1.

<sup>7</sup> *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds*, *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Heathman*, 224 Neb. 19, 395 N.W.2d 538 (1986).

innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.<sup>8</sup>

But application of the general rule must be tempered with some measure of common sense. Jurors are aware that the defendant “did not arrive there by choice or happenstance.”<sup>9</sup> It is not possible to “eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct.”<sup>10</sup>

In *State v. Mata*,<sup>11</sup> it was undisputed that jurors observed the defendant in leg restraints as he walked 15 to 20 feet through the courtroom. But we held that the district court did not err in overruling his motion for mistrial, reasoning in part that “[t]he restraints could serve only to call the jury’s attention to what it already knew—that [the defendant] was charged with a serious crime.”<sup>12</sup> Viewing the proceedings in their entirety, we concluded that the defendant was not additionally stigmatized or deprived of a fair trial by the use of leg restraints.

Here, it is not clear from the record that any prospective juror ever actually saw Dixon in leg restraints. Moreover, when the issue was called to the trial judge’s attention, she took immediate steps to ensure that jurors would not see the restraints. When Dixon testified, he was fitted with a leg brace so he could walk to the witness stand. When he completed his testimony, he remained seated in the witness stand until the jury left the courtroom. Considering the sparse factual record of the leg restraint incident in the context of the entire proceeding, we conclude that the district court did

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<sup>8</sup> *State v. Mata*, *supra* note 7, 266 Neb. at 691, 668 N.W.2d at 471.

<sup>9</sup> *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

<sup>10</sup> *Id.*

<sup>11</sup> *State v. Mata*, *supra* note 7.

<sup>12</sup> *Id.* at 692, 668 N.W.2d at 472.

not abuse its discretion in overruling Dixon's first motion for mistrial.

(b) Second Motion for Mistrial

Dixon argues that the trial court abused its discretion in overruling his motion for a mistrial based on the testimony of Sgt. Gregory H. Sorensen of the Lincoln Police Department. Sorensen compiled the photographic array from which J.K. identified Dixon as the perpetrator of the assaults. Prior to trial, the district court entered an order determining that evidence of another crime for which Dixon had been convicted in *State v. Dixon (Dixon I)*<sup>13</sup> was inadmissible in this case under § 27-404(1). On direct examination, Sorensen stated that he showed a series of photographs to J.K. on May 2, 2009. He stated that the individuals portrayed in the photographs were selected through "matching physical descriptions, possibly Crimestoppers, probably known sex offenders." Sorensen said police had no "clear cut suspect" at that time. He selected the photographs after he was "given names by other detectives in the criminal unit that were also working on the case. And they were names that they had come up with either — like I said, from people that were on parole for sex crimes, violent histories, information, people that matched physical description."

At that point, Dixon's counsel asked for a sidebar, in which he stated that Sorensen's testimony violated the court's pretrial rulings with respect to evidence of other crimes and that the testimony implied that Dixon was a convicted sex offender and on parole. Counsel moved for a mistrial or an attempt to clarify that Dixon was not a known sex offender. The court overruled the motion, reasoning that Sorensen had mentioned a number of different criteria used in selecting the photographs.

Dixon contends that the State was on notice Dixon's prior conviction was not admissible and that Sorensen's testimony was so fundamentally unfair that no admonition could have

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<sup>13</sup> *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

removed the unfairness. In support of this argument, he relies on *State v. Jones*,<sup>14</sup> in which a serologist testified that she had compared hair examples from the defendant which she received in “‘a different case.’” The trial court overruled the defense objection to the testimony, but it admonished the jury to disregard the witness’ comments.<sup>15</sup> This court noted that a mistrial may be warranted when an admonition to the jury cannot erase the unfair prejudice,<sup>16</sup> but determined that the admonishment was sufficient to eradicate any unfair prejudice to the defendant.<sup>17</sup> In the case at bar, there was no admonishment because Dixon did not ask the court to do so. He argues on appeal that to request an admonishment would have brought the issue to the jury’s attention and exacerbated the problem.

[7] A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.<sup>18</sup> Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.<sup>19</sup> Here, that threshold was not met. Sorensen listed several general criteria he used in compiling the photographs which he showed to J.K., and he made no reference to any other crimes committed by Dixon. We conclude that Dixon has not demonstrated that he was actually prejudiced or deprived of a fair trial by Sorensen’s testimony, and the district court did not abuse its discretion in overruling his motion for a mistrial.

## 2. IDENTIFICATION BY VICTIM

Dixon argues that the district court erred in overruling his pretrial motion to suppress J.K.’s identification of him as her

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<sup>14</sup> *State v. Jones*, 232 Neb. 576, 578, 441 N.W.2d 605, 607 (1989).

<sup>15</sup> *Id.*

<sup>16</sup> *State v. Jones*, *supra* note 14.

<sup>17</sup> *Id.*

<sup>18</sup> *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

<sup>19</sup> *Id.*

assailant and in subsequently admitting her identification testimony at trial over his objection. He contends that the photographic array procedure through which J.K. first identified him was unduly suggestive, that J.K. did not observe her assailant unmasked for a sufficient time to make a reliable identification, and that there were inconsistencies in her testimony regarding the identification. The facts relevant to these issues were established primarily by the testimony of J.K. and Sorensen at the suppression hearing and at trial. We summarize that testimony now.

(a) Suppression Hearing

At a suppression hearing on November 17, 2009, J.K. testified that she was in the presence of her assailant for 10 hours and that she was able to observe him without a mask on two occasions. The first was when he entered the apartment, an encounter which lasted approximately 10 minutes. At that time, the lights were on in her kitchen and the television in the living room was on. The second was when he lay next to her on the bed. At that time, the lights were off.

J.K. testified that about a week after the assault, Sorensen presented her with a photographic array of individuals who matched the description she had given of her assailant. She recognized one of the photographs as someone who looked similar to her assailant. She believed Sorensen had shown her 20 photographs that day. She said she separated the photographs based on whether the individual looked like her assailant. When she reached the photograph of Dixon, she placed his photograph in a “maybe” pile and moved all of the other photographs into a “no” pile. She said she later told Sorensen she was 60- to 70-percent sure she had correctly identified her assailant. At the hearing, she testified that she was 100-percent sure that Dixon was the assailant. She was more certain “[b]ecause people look different in photos than they do in person.” J.K. said she has astigmatism and wears glasses, but she was not wearing them the night of the assault.

Sorensen testified that another officer put together a list of individuals who matched the physical description given to police in connection with a series of recent sexual assaults

and robberies. Sorensen located photographs of the individuals whose names were collected by the other officer. He collected nine photographs of individuals who matched the physical description, using computer mug shots and driver's license photographs. Sorensen said J.K. looked through the photographs and put each on a pile until she got to the photograph of Dixon. She said the man in that photograph looked most similar to the person who assaulted her.

The trial court found that the procedures used by the police were "in no way unduly suggestive or conducive to irreparable mistaken identity." It also held that J.K.'s in-court identification should not be suppressed, because she testified that she based her identification on her "observations and memory relating to her attack" and "nothing else."

#### (b) Trial

At trial, J.K. stated that she looked at photographs at the police station at the request of Sorensen about a week after the assault. After separating them into a "maybe" pile and a "no" pile, J.K. selected one as looking most like the person who assaulted her. J.K. said that the longer she looked at the photograph, the more nervous she got, and that her heart started pounding. Over Dixon's objection, she identified Dixon as the individual who assaulted her. Her identification was based on the time she spent with the assailant in her apartment. J.K. said she was 100-percent sure that Dixon was her assailant. On cross-examination, J.K. stated that she had been only 60- to 70-percent sure when she talked to Sorensen on the phone about a week after the initial identification, but she did not recognize any of the other men in the photographic lineup.

J.K.'s sister testified that J.K. called her before and after J.K. went to the police station to look at a photographic array. The sister advised J.K. to take her time when looking at the photographs, but she did not tell J.K. she must identify someone.

Sorensen testified at trial that he showed J.K. a series of photographs on May 2, 2009. Sorensen said J.K. went through each photograph until she reached the eighth one, which she set

aside. It was a photograph of Dixon. Sorensen said he did not give J.K. any instructions on how to separate the photographs. J.K. said that the photograph of Dixon looked most similar to the person who had assaulted her, but that she did not think the assailant had braids in his hair and that he appeared to be “more scruffy” than the person in the photograph.

Sorensen talked to J.K.’s sister on May 7, 2009, and then contacted J.K. again to find out what she had told her sister about the photographs. J.K. said she had told her sister the last photograph she looked at was the person who assaulted her. That photograph was of Dixon.

### (c) Resolution

In *State v. Nolan*,<sup>20</sup> we summarized the recent holding of the U.S. Supreme Court in *Perry v. New Hampshire*<sup>21</sup> regarding eyewitness identification as follows:

[T]he Court held that “the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances *arranged by law enforcement*.” Suppression of identification evidence on the basis of undue suggestion is appropriate only where the witness’ ability to make an accurate identification is outweighed by the corrupting effect of improper police conduct. When no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.<sup>22</sup>

Applying these principles in *Nolan*, we concluded that the evidence regarding the challenged identification “falls far short

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<sup>20</sup> *State v. Nolan*, *supra* note 2.

<sup>21</sup> *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

<sup>22</sup> *State v. Nolan*, *supra* note 2, 283 Neb. at 63, 807 N.W.2d at 535, quoting *Perry v. New Hampshire*, *supra* note 21.

of the affirmative police misconduct that, under *Perry*, must be shown in order for pretrial suppression of the evidence to be appropriate.”<sup>23</sup>

We reach the same conclusion here. Dixon argues that the State did not demonstrate a need for the type of photographic array used here, but Sorensen testified that at the time he assembled the array, no suspects had yet been identified. It is true that there are some minor discrepancies in the testimony regarding the manner in which the photographic array was presented. But these minor discrepancies do not make the procedure unduly suggestive. Based upon our de novo review, we conclude that the identification procedure was not tainted by affirmative police misconduct so as to require a preliminary judicial inquiry into the reliability of J.K.’s identification of Dixon as her assailant. The district court did not err in overruling Dixon’s motion to suppress this evidence.

[8] Nor did the court err in permitting J.K. to identify Dixon at trial. As in *Nolan*, it was the jury’s duty in this case to assess J.K.’s credibility, and Dixon was free to probe that issue through cross-examination, as he did. Likewise, Sorensen was subject to cross-examination with respect to the procedure used to develop the photographic array. It was for the jury to determine whether J.K. observed her assailant unmasked for a sufficient period of time to make a reliable identification and whether she had made inconsistent statements regarding her degree of certainty. An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence presented; such matters are for the finder of fact.<sup>24</sup>

### 3. MOTION FOR DIRECTED VERDICT

At the close of evidence, Dixon made a motion for directed verdict, which the court overruled. In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative

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<sup>23</sup> *Id.* at 64, 807 N.W.2d at 535-36.

<sup>24</sup> *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

value, that a finding of guilt based on such evidence cannot be sustained.<sup>25</sup> The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>26</sup>

Dixon argues that without J.K.'s identification of him as the assailant, the jury would have acquitted him. He claims her identification was not credible. As noted above, however, there was no error in the trial court's admission of the identification. The jury apparently believed J.K.'s identification of Dixon, and we are bound by its determination.

Dixon also argues that he was at work the night of the assault and that his phone records contradicted J.K.'s report that the man who attacked her was texting after the first sexual assault. The State introduced evidence from Dixon's employers that could support an inference that Dixon manipulated his work records to show that he was present when in fact he was not. The phone records that were introduced supported an inference that Dixon was in the vicinity of J.K.'s apartment at the time of the assaults. In addition, evidence was introduced that Dixon had access to latex gloves at both of his places of employment.

Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.<sup>27</sup> The evidence was sufficient to support the convictions.

#### 4. HABITUAL CRIMINAL DETERMINATION

[9,10] Dixon assigns that the district court erred in determining that he was a habitual criminal and sentencing him accordingly, because the State failed to prove prior convictions upon which habitual criminal status is premised.<sup>28</sup> In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions

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<sup>25</sup> *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

<sup>26</sup> *Id.*

<sup>27</sup> See *id.*

<sup>28</sup> See § 29-2221 and Neb. Rev. Stat. § 29-2222 (Reissue 2008).

by a preponderance of the evidence.<sup>29</sup> In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.<sup>30</sup>

The State offered the same evidence at the habitual criminal hearing in this case as it offered in *Dixon I*: four exhibits purporting to show prior felony convictions. Dixon's counsel objected to the exhibits, as he did in *Dixon I*, on the ground that the State did not establish that Dixon was the same person referred to in the exhibits reflecting the prior convictions. Counsel also reasserted his objection that because one of the convictions was for aiding and abetting first degree assault, it could not be used for habitual criminal enhancement. As it did in *Dixon I*, the district court overruled the objections, received the evidence, and sentenced Dixon as a habitual criminal.

We concluded in *Dixon I*:

The names in all four of the prior convictions are "Armon Dixon" or "Armon M. Dixon" and thus match Dixon's name. Because Dixon has not denied that he is the person referred to in these earlier convictions and has not presented any evidence contradicting the State's position, . . . this is sufficient. Moreover, the birth dates reflected on three of the prior convictions are consistent with Dixon's age. The State has proved the prior convictions by a preponderance of the evidence.<sup>31</sup>

We reach the same conclusion here.

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<sup>29</sup> *Dixon I*, *supra* note 13; *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

<sup>30</sup> *Dixon I*, *supra* note 13; *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

<sup>31</sup> *Dixon I*, *supra* note 13, 282 Neb. at 292, 802 N.W.2d at 884.

Dixon urges that we reconsider our holding in *Dixon I* because it impermissibly shifts the burden of proof to the defendant. We disagree that our prior holding has that effect. The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.<sup>32</sup> Here, the State's evidence established a prima facie showing of prior convictions necessary for habitual criminal enhancement, and in the absence of any evidence to the contrary, the district court did not err in determining that the State had met its burden.

Dixon also repeats his argument from the prior appeal that the trial court erred in using a prior conviction for aiding and abetting for enhancement. We reject this argument for the same reasons we rejected it in *Dixon I*.<sup>33</sup>

#### 5. EXCESSIVE SENTENCES

Dixon asserts that the trial court abused its discretion in imposing more than the mandatory minimum sentences required by the habitual criminal statute. He claims that the sentences are excessive when considering he has a 15-year-old daughter, he was working two jobs, he had graduated from high school, and he had a fatherly relationship with his girlfriend's children.

[11] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.<sup>34</sup>

[12] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must

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<sup>32</sup> *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004); *State v. Luna*, 211 Neb. 630, 319 N.W.2d 737 (1982).

<sup>33</sup> *Dixon I*, *supra* note 13.

<sup>34</sup> *State v. Wills*, *supra* note 4.

determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.<sup>35</sup> The sentences imposed in this case were within the statutory limits, and there was no abuse of discretion by the trial court.

[13] Dixon also argues that the robbery sentence should have been ordered to be served concurrently to the sexual assault sentence, for the reasons that both relied on the same fact pattern and the robbery was ancillary to the sexual assault because the items stolen were taken to conceal the sexual assault offense. It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes.<sup>36</sup> The crimes arose from the same incident, but they were completely different crimes with different elements. There was no abuse of discretion in the trial court's order of consecutive sentences.

## V. CONCLUSION

Finding no merit in any of Dixon's assignments of error, we affirm the judgment of the district court.

AFFIRMED.

CASSEL, J., not participating.

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<sup>35</sup> *State v. Erickson*, *supra* note 3.

<sup>36</sup> *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991).

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LADD D. KRINGS, APPELLEE, V. GARFIELD COUNTY BOARD OF  
EQUALIZATION, APPELLEE, AND DOUGLAS A. EWALD, TAX  
COMMISSIONER, AND RUTH A. SORENSEN, PROPERTY  
TAX ADMINISTRATOR, APPELLANTS.

835 N.W.2d 750

Filed July 26, 2013. No. S-12-623.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.

2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Constitutional Law.** Constitutional interpretation presents a question of law.
4. **Taxation: Appeal and Error.** Questions of law arising during appellate review of the Tax Equalization and Review Commission decisions are reviewed de novo on the record.
5. **Taxation: Valuation: Words and Phrases.** Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value.
6. **Taxation: Valuation.** The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.
7. **Constitutional Law: Taxation: Appeal and Error.** The need for equalization by a county board of equalization, and by the Tax Equalization and Review Commission when reviewing the decision of a county board of equalization, stems from the constitutional requirement of uniformity contained in Neb. Const. art. VIII, § 1.
8. **Constitutional Law: Taxation: Valuation: Property: Agriculture.** Because Neb. Const. art. VIII, § 1(4), allows for agricultural and horticultural property to be valued in a way that is not uniform and proportionate with all other real property and because statutes have been enacted effectuating this difference, it is unnecessary and improper to equalize the value of nonagricultural, nonhorticultural property with the value of agricultural and horticultural property.

Appeal from the Tax Equalization and Review Commission.  
Affirmed in part, and in part reversed and remanded with directions.

Jonathan D. Cannon, Special Assistant Attorney General,  
and Mihdi Vahedi, Senior Certified Law Student, for appellants.

No appearance for appellees.

HEAVICAN, C.J., WRIGHT, STEPHAN, McCORMACK, and  
CASSEL, JJ.

PER CURIAM.

#### NATURE OF CASE

Douglas A. Ewald, Tax Commissioner, and Ruth A. Sorensen, Property Tax Administrator, of the Department of Revenue (collectively the Department), appeal a decision of the Tax Equalization and Review Commission (TERC). TERC

concluded that the Garfield County Board of Equalization (the Board) correctly determined that land owned by taxpayer Ladd D. Krings was not agricultural or horticultural land. TERC further concluded, however, that the value of Krings' nonagricultural, nonhorticultural property should be equalized with the value of agricultural and horticultural land and, because TERC viewed the assessor's assessments of agricultural and horticultural land to be impermissibly low, equalized Krings' property by reducing its assessed value.

The Department agrees with TERC's conclusion that Krings' land was not agricultural or horticultural, but disagrees with TERC's conclusions that (1) the assessed value of Krings' nonagricultural, nonhorticultural land should be equalized with the assessed value of agricultural and horticultural land and (2) the county assessor's assessments of agricultural and horticultural land were improper.

There is no challenge before us relative to the finding that Krings' property is nonagricultural and nonhorticultural, and we affirm that decision. There is no challenge before us relative to a small portion of property deemed agricultural and horticultural, and we do not consider this decision by TERC. We conclude that when TERC determined that it needed to equalize the value of Krings' nonagricultural, nonhorticultural land with the value of agricultural and horticultural land in the county, such decision did not conform to the law. We therefore reverse that portion of the order wherein TERC performed such equalization. Because of this disposition, we need not consider whether the county assessor properly assessed agricultural and horticultural land.

#### STATEMENT OF FACTS

Krings owns two contiguous parcels of land in Garfield County, Nebraska, which total 480 acres. One parcel is improved with a single-family dwelling. A combined 448.21 acres of the two parcels is subject to a warranty easement deed that Krings granted to the U.S. Commodity Credit Corporation as part of the Wetlands Reserve Program. In exchange for a one-time payment of \$242,034, Krings granted the easement which placed restrictions on the use of the land for the

purpose of preserving the land as wetlands and a wildlife habitat. Krings was allowed certain compatible uses of the land, including managed timber harvesting and occasional haying or grazing.

The parcels were assessed for property tax purposes for the 2010 tax assessment year at \$39,895 and \$258,845. Krings protested such valuations to the Garfield County assessor and requested values of \$18,000 and \$152,320. The assessor recommended no changes, and the Board adopted the assessor's recommendations and original valuations. Krings appealed the Board's determinations regarding the parcels to TERC.

Krings asserted to TERC that the nonresidential portion of the parcels should have been assessed as agricultural or horticultural land as defined in Neb. Rev. Stat. § 77-1359 (Reissue 2009). If considered agricultural or horticultural land, pursuant to Neb. Rev. Stat. § 77-201(2) (Reissue 2009), the land would be assessed at 75 percent of its actual value. After a hearing, TERC concluded that the land was primarily used for the conservation purposes of the Wetlands Reserve Program, rather than for agricultural or horticultural purposes, that it therefore was not agricultural or horticultural land under § 77-1359, and that it therefore should be assessed at its actual value.

However, TERC went on to consider whether the assessed value of Krings' land should have been equalized with other property in Garfield County. TERC determined that for the 2010 tax assessment year at issue, the Garfield County assessor had improperly valued agricultural and horticultural land in the county at 70 percent of its actual value rather than 75 percent as provided in § 77-201(2). TERC concluded that in order for Krings' nonagricultural, nonhorticultural land to be equalized with the agricultural and horticultural land in the county, it must be assessed at 93.33 percent (70 percent divided by 75 percent) of its actual value. TERC therefore ordered lower equalized values for Krings' nonagricultural, nonhorticultural property.

Under Neb. Rev. Stat. § 77-701(4) (Cum. Supp. 2012), "[t]he Tax Commissioner or Property Tax Administrator may appeal any final decision of [TERC] relating to the granting

or denying of an exemption of real or personal property or relating to the valuation or equalization of real property.” The Department has appealed TERC’s decision in this case.

### ASSIGNMENTS OF ERROR

The Department claims that TERC erred when it (1) concluded that the value of Krings’ nonagricultural, nonhorticultural land must be equalized with the value of agricultural and horticultural land in the county and (2) concluded that the Garfield County assessor improperly assessed agricultural and horticultural land at 70 percent of its actual value.

### STANDARDS OF REVIEW

[1,2] Appellate courts review decisions rendered by TERC for errors appearing on the record. See, Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2012); *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012). When reviewing a judgment for errors appearing on the record, an appellate court’s inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Republic Bank v. Lincoln Cty. Bd. of Equal.*, *supra*.

[3,4] Constitutional interpretation presents a question of law. *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011). Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Republic Bank v. Lincoln Cty. Bd. of Equal.*, *supra*.

### ANALYSIS

As an initial matter, we note that the Department agrees with TERC’s determination that Krings’ property was not agricultural or horticultural land. We further note that Krings did not appeal from TERC’s decision and does not challenge TERC’s decision that his land was not agricultural or horticultural land. Although the Department devotes a section of its brief supporting TERC’s conclusion that Krings’ land was not agricultural or horticultural land, the issue whether Krings’ property is agricultural or horticultural land was not assigned as error and is not reviewed by this court in this appeal.

TERC's determination that Krings' property is nonagricultural and nonhorticultural is therefore affirmed. For completeness, we note that we are aware that TERC found a small portion of Krings' property to be properly characterized as agricultural and horticultural, and the Department does not challenge this determination, or that it was appropriate to equalize the value of this property with the value of other agricultural and horticultural land in the county. There is not an explicit assignment of error regarding this parcel, and we therefore do not discuss the correctness of its equalized value.

The Department first contends that TERC erred when it concluded that the value of Krings' nonagricultural, nonhorticultural land must be equalized with the value of agricultural and horticultural land in the county. We agree with the Department's argument that the Nebraska Constitution allows agricultural and horticultural land to be assessed at values that are not uniform with other types of land and that therefore, it was improper for TERC to equalize the value of Krings' nonagricultural, nonhorticultural land with the value of agricultural and horticultural land in the county.

[5-7] At issue in this case is Neb. Const. art. VIII, § 1, as it relates to the valuation of real property for purposes of taxation. Article VIII, § 1(1), provides in relevant part that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property . . . except as otherwise provided in or permitted by this Constitution." Our prior case law indicates that the need for equalization stems from the constitutional requirement that real property be taxed using uniform and proportionate valuations. See *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008). In *Brenner*, we noted the constitutional requirement of uniform and proportionate valuation and stated:

Equalization is the process of ensuring that all taxable property is placed on the assessment rolls at a uniform percentage of its actual value. The purpose of equalization of assessments is to bring the assessment of different parts of a taxing district to the same relative standard, so that no one of the parts may be compelled to pay a disproportionate part of the tax.

276 Neb. at 294, 753 N.W.2d at 818. We further tied the process of equalization to the constitutional requirement of uniformity when we stated that in carrying out its “duty to correct and equalize individual discrepancies and inequalities in assessments within the county,” a county board of equalization “must give effect to the constitutional requirement that taxes be levied uniformly and proportionately upon all taxable property in the county.” *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 965, 613 N.W.2d 810, 818 (2000). The need for equalization by a county board, and by TERC when reviewing the decision of a county board of equalization, stems from the constitutional requirement of uniformity contained in article VIII, § 1.

However, while article VIII, § 1(1), requires uniform valuation of real property, as noted, such requirement is qualified by the phrase “except as otherwise provided in or permitted by this Constitution.” Additional constitutional language pertaining to agricultural and horticultural land is relevant to the present case. Article VIII, § 1(4), provides as follows:

[T]he Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural and horticultural land[.]

Acting on the authority of article VIII, § 1(4), the Legislature enacted § 77-1359, which defines “agricultural land and horticultural land” and which states in part:

The Legislature finds and declares that agricultural land and horticultural land shall be a separate and distinct class of real property for purposes of assessment. The assessed value of agricultural land and horticultural land shall not be uniform and proportionate with all other real property, but the assessed value shall be uniform and

proportionate within the class of agricultural land and horticultural land.

The Legislature also enacted § 77-201(2), which currently provides, “Agricultural land and horticultural land as defined in section 77-1359 shall constitute a separate and distinct class of property for purposes of property taxation, shall be subject to taxation, unless expressly exempt from taxation, and shall be valued at seventy-five percent of its actual value.” Thus, the framework for deciding this case is embodied in article VIII, § 1(1) and 1(4), of the Nebraska Constitution, as informed by the enabling legislation found at §§ 77-1359 and 77-201(2).

[8] The Department argues, and we agree, that because article VIII, § 1(4), allows for agricultural and horticultural property to be valued in a way that is not uniform and proportionate with all other real property and because statutes have been enacted effectuating this difference, it was unnecessary and improper for TERC to equalize the value of Krings’ nonagricultural, nonhorticultural property with the value of agricultural and horticultural property in the county. Upon our appellate review, we conclude that the decision of TERC in this regard did not conform to the law. See *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012).

In reaching its decision, TERC relied in part on *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), and determined that the value of Krings’ nonagricultural, nonhorticultural land needed to be equalized with the value of agricultural and horticultural land in the county. TERC’s reliance on *Kearney Convention Center* was misplaced. In *Kearney Convention Center*, this court concluded that for the year 1981, a taxpayer’s improved nonagricultural, nonhorticultural real property referred to as an “urban convention center” “was not assessed uniformly and proportionately with other property, to wit, farmland” and that the assessment of the taxpayer’s property should be reduced to equalize its value with such other property. 216 Neb. at 303, 344 N.W.2d at 626. We note, however, that when *Kearney Convention Center*

was decided on January 27, 1984, article VIII, § 1, did not contain the provisions quoted above relating to agricultural land and horticultural land and that article VIII, § 1, was amended twice after *Kearney Convention Center* was decided in order to include the language presently contained in article VIII, § 1(4), pertaining to the different treatment of agricultural and horticultural land.

The first of the two amendments was described by this court as follows:

In 1984 the Legislature proposed an amendment to Neb. Const. art. VIII, § 1. This amendment . . . was adopted by the voters at the November 6, 1984, election. . . . The proposition on the ballot stated, "A constitutional amendment authorizing the Legislature to separately classify agricultural and horticultural land." L. Res. 7, 88th Leg., 1st Spec. Sess. (1984). The amendment added the following language to art. VIII, § 1: "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of taxation."

*Banner County v. State Bd. of Equal.*, 226 Neb. 236, 244, 411 N.W.2d 35, 41 (1987). This court noted in *Banner County* that the 1984 amendment did not repeal the uniformity clause of article VIII, § 1. This court therefore read the amendment in connection with the uniformity clause and concluded that "the Legislature can divide the class of tangible property into different classifications, but these classifications remain subdivisions of the overall class of 'all tangible property,' and there must be a correlation between them to show uniformity." *Banner County v. State Bd. of Equal.*, 226 Neb. at 254, 411 N.W.2d at 46.

After this court filed the decision in *Banner County*, the Legislature in 1989 proposed another amendment to Neb. Const. art. VIII, § 1. See 1989 Neb. Laws, L.R. 2. The amendment was approved by voters in 1990. This second amendment did not repeal the uniformity clause but added language now found at article VIII, § 1(4), stating that in addition to providing that agricultural land and horticultural

land constitute a separate and distinct class of property, the Legislature

may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property and franchises but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land.

The Introducer's Statement of Intent for L.R. 2 stated that it was a response to "the doubt the Nebraska Supreme Court has cast on the validity of" the 1984 amendment and legislation enacted pursuant thereto and that the intent was "to resolve this legal uncertainty by providing a clear exception to the uniformity requirement of the Nebraska Constitution for agricultural land." Revenue Committee, 91st Leg., 1st Sess. (Feb. 2, 1989).

The amendment proposed by the Legislature in 1989 addressed this court's decision in *Banner County*. The amendment clearly provided that although values of agricultural and horticultural land were to be uniform and proportionate within the class, they were not required to be uniform and proportionate with the value of other real property. Because the language of this provision, article VIII, § 1(4), is clear, it is not open to construction. See *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

As discussed above, the equalization process has the purpose of giving effect to the constitutional requirement of uniformity. However, after the amendments to article VIII, § 1, and the enactment of statutes pursuant to such authority providing for a different method of taxing agricultural and horticultural land, the constitution does not require uniformity between the class of agricultural and horticultural land and other types of real estate. Therefore, it is no longer required or proper to equalize the value of nonagricultural, nonhorticultural land with the value of agricultural and horticultural land. Equalization is still required within the class of agricultural and horticultural land, because the constitution still requires uniformity within that class. Therefore, when TERC undertook the task of equalizing the portion of Krings' land

which is agricultural and horticultural with agricultural and horticultural land in the county, the approach was authorized. Equalization is also required to give effect to the uniformity clause with respect to property generally, except to the extent that article VIII, § 1, makes certain exceptions to the uniformity requirement, including the exception for agricultural and horticultural land.

We conclude that TERC erred in this case when it endeavored to equalize the value of Krings' nonagricultural, nonhorticultural property with the value of agricultural and horticultural land in the county. There is no longer a constitutional requirement for the value of agricultural and horticultural land to be uniform and proportionate with the value of other real property; therefore, the equalization between Krings' nonagricultural, nonhorticultural land and the agricultural and horticultural land in the county was improper. We therefore reverse the portion of TERC's order in paragraph 2 in which it equalized the value of Krings' nonagricultural, nonhorticultural property with the value of agricultural and horticultural property. We further reverse that portion of TERC's order in paragraph 1 in which it vacated and reversed the value of nonagricultural, nonhorticultural property as decided by the Board.

The Department also assigns error to TERC's determination and discussion regarding the assessor's assessment of agricultural and horticultural land at 70 percent rather than 75 percent of its actual value. Krings' land is nonagricultural and nonhorticultural, and, as we have determined, there was no basis for equalization of Krings' nonagricultural, nonhorticultural land with agricultural and horticultural land in the county. TERC's comments regarding the assessor's actions exceeded the proper scope of the appeal before TERC. It was unnecessary in this case for TERC to consider or to explore whether the assessment of agricultural and horticultural land had been appropriately performed, and regardless of the substance of its analysis, we need not consider whether TERC erred in its conclusions regarding the assessment of agricultural and horticultural land.

### CONCLUSION

Because no error was assigned to TERC's determination that Krings' land was nonagricultural and nonhorticultural, we affirm that portion of TERC's order in which it so concluded. There is also no challenge to the correctness of the determination that a small portion of the property was agricultural and horticultural and that it was subject to equalization with other agricultural and horticultural land in the county, and we enter no order affecting this decision. We conclude that TERC erred when it equalized the value of Krings' nonagricultural, nonhorticultural land with the value of agricultural and horticultural land in the county. TERC's decision to equalize in this fashion did not conform to the law. We therefore reverse those portions of the order in which TERC reversed the Board's valuation regarding Krings' nonagricultural, nonhorticultural property and performed such equalization. We remand the cause to TERC with directions to enter an order ruling on the Board's determinations, consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED  
AND REMANDED WITH DIRECTIONS.

CONNOLLY and MILLER-LERMAN, JJ., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V.  
MATTHEW L. PANGBORN, APPELLANT.  
836 N.W.2d 790

Filed July 26, 2013. No. S-12-941.

1. **Trial: Evidence: Appeal and Error.** The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.
2. **Trial: Juries: Evidence.** Demonstrative exhibits are defined by the purpose for which they are offered at trial—to aid or assist the jury in understanding the evidence or issues in a case.
3. **Trial: Evidence.** Exhibits admitted only for demonstrative purposes do not constitute substantive evidence.
4. **Rules of Evidence.** Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal

decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.

5. **Trial: Judges.** In Nebraska, a trial judge has broad discretion over the conduct of a trial.
6. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
7. **Trial: Judges: Juries: Evidence.** A trial judge may exercise his or her broad judicial discretion to allow or disallow the use of demonstrative exhibits during jury deliberations.
8. \_\_\_\_: \_\_\_\_: \_\_\_\_: \_\_\_\_\_. It is an abuse of discretion for a trial judge to send a demonstrative exhibit to the jury for use in deliberations without first weighing the potential prejudice in allowing such use against the usefulness of the exhibit and employing adequate safeguards to prevent prejudice.
9. **Criminal Law: Appeal and Error.** Errors, other than structural errors, which occur within the trial and sentencing process, are subject to harmless error review.
10. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
11. **Criminal Law: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
12. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
13. **Constitutional Law: Criminal Law: Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
14. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
15. \_\_\_\_\_. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Reversed and remanded for a new trial.

Brett McArthur for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, STEPHAN, MCCORMACK, and CASSEL, JJ.

CASSEL, J.

## I. INTRODUCTION

Matthew L. Pangborn appeals from his convictions and sentences on nine counts involving actual or attempted violence or physical abuse upon “persons with intellectual disabilities who require[d] residential care.”<sup>1</sup> The main question presented is whether the district court abused its discretion in allowing the jury to use in its deliberations the State’s “road map”—a chart admitted for demonstrative purposes only. Because the district court allowed the use of this demonstrative exhibit in jury deliberations without providing adequate limiting instructions or employing any other safeguards against prejudice, we find that the court abused its discretion. We reverse, and remand for a new trial.

## II. BACKGROUND

In October 2011, a complaint was filed in county court charging Pangborn with six counts of abuse of a vulnerable adult and five counts of strangulation. All counts arose from Pangborn’s employment at the Beatrice State Developmental Center (BSDC) in Beatrice, Nebraska, and involved three adult residents at that facility. The parties stipulated that all three alleged victims were vulnerable adults as defined by statute. After a hearing in county court, Pangborn was bound over to the district court for arraignment. He entered pleas of “not guilty” to all 11 counts. One count of strangulation was later dismissed with prejudice at the State’s request.

A jury trial on the remaining 10 counts was held over several days in July 2012. During the trial, eight witnesses testified and numerous exhibits were admitted into evidence. In particular, exhibit 36 was central to presentation of the State’s case. Having prepared the exhibit as a “road map” of its case, the State repeatedly relied upon exhibit 36 when delivering opening and closing statements and when examining

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<sup>1</sup> See 2013 Neb. Laws, L.B. 23, § 50 (prior version codified at Neb. Rev. Stat. § 83-217 (Reissue 2008)).

and cross-examining witnesses. Exhibit 36 was admitted for demonstrative purposes only, but later was submitted to the jury for use during deliberations, over Pangborn's objection. Two other exhibits are relevant for purposes of appeal. Exhibits 37 and 38 consisted of timesheets from BSDC and were admitted under the business records exception to the hearsay rule, which admission Pangborn assigns as error.

Before we more thoroughly describe the circumstances surrounding the use of exhibit 36—circumstances which are critical to our analysis—we provide a detailed description of the exhibit. Exhibit 36 was a one-page chart that the State described as providing a “road map” that it would use “during the course of the trial for clarification purposes only.” It consisted of five columns labeled “COUNT,” “VICTIM,” “WITNESS,” “LOCATION,” and “INJURY.” Each of the 11 original charges was listed in the column labeled “COUNT.” For each count, the remaining columns identified the BSDC resident who was the alleged victim, the individual who supposedly witnessed Pangborn's abuse upon the victim (all of whom testified at trial to what they saw), the exact location where the alleged abuse was witnessed, and the precise nature of the violence allegedly inflicted upon the victim by Pangborn. These injuries were identified in the fifth column of the chart as “[s]truck on top of head,” “[s]truck on ear,” “[e]lbowed in chest,” “[c]hoked unconscious,” or “[c]hoked.” Essentially, the exhibit was a concise summary of the evidence the State planned to present against Pangborn on each count—hence, a “road map.”

The morning of trial, the parties discussed the proposed exhibit 36 with the district court in the absence of the jury. Pangborn had no objection to the use of exhibit 36 for demonstrative purposes, but moved that the jury not be allowed to use the exhibit during deliberations. At that time, the court received exhibit 36 for demonstrative purposes, but held that the exhibit could not be used during deliberations. The court did not communicate this ruling to the jury in any way but merely asked the State to “offer” exhibit 36 before publishing it to the jury at trial and noted that the court might revisit the issue of use during deliberations at a later time.

Throughout the trial that followed, the State relied heavily upon its “road map” in presenting its case against Pangborn. Despite this extensive usage of the exhibit, the district court did not explain to the jury the limited purpose of the exhibit, distinguish it from other substantive exhibits, or provide any guidance regarding its proper use.

Early in its opening statement, the State first displayed exhibit 36 to the jury. But the State did not offer the exhibit as the district court had requested or ask for permission to publish. The only explanation provided for the exhibit was the following statement made by the State during opening arguments: “In order to help you try to work through this, we have prepared what we are calling a road map, and we encourage you to utilize this. It’s been stipulated to by the parties and provided also to the judge . . . .” The court neither clarified nor elaborated upon the State’s minimal explanation.

Although the record is not precisely clear about each instance when exhibit 36 was used during the remainder of the trial, the briefs suggest that exhibit 36 was employed by the State throughout the examination and cross-examination of witnesses and was frequently displayed to the jury. Neither the State nor the district court identified exhibit 36 as having previously been admitted for demonstrative purposes at any point during the trial.

At the conclusion of all evidence, the district court held an in-chambers jury instruction conference. During that conference, the court announced that it was going “to take up on [its] own motion the matter of Exhibit 36.” Because it found that exhibit 36 “would be very helpful to the jury to have and would not be prejudicial, although, it is a demonstrative exhibit,” the court ruled that the jury would be allowed to use exhibit 36 during deliberations. Pangborn objected, but his objection was overruled. Neither this ruling nor any other explanation regarding the use of exhibit 36 during deliberations was communicated to the jury.

Following closing arguments, the district court gave jury instructions and submitted the case to the jury. The court’s instructions to the jury included the standard jury instruction on exhibits admitted for limited purposes: “During the trial[,]

I called your attention to some evidence that was received for a specific limited purpose; you must consider that evidence only for those limited purposes and for no other.” Significantly, however, the instructions given by the court failed to identify that exhibit 36 had been admitted for the limited purpose of a demonstrative exhibit. And, as noted earlier, the court initially admitted exhibit 36 outside the presence of the jury and never informed the jury at any point during the trial that the exhibit was admitted only for demonstrative purposes.

After deliberation, the jury found Pangborn guilty on four counts of abuse of a vulnerable adult, one count of attempted abuse of a vulnerable adult, three counts of strangulation, and one count of attempted strangulation. The jury found Pangborn not guilty of one count of abuse of a vulnerable adult. After unsuccessfully moving for a new trial, Pangborn was sentenced to an aggregate sentence of 15 to 23 years’ imprisonment.

Pangborn timely appeals. Pursuant to statutory authority, we moved the case to our docket.<sup>2</sup>

### III. ASSIGNMENTS OF ERROR

Pangborn chiefly assigns that the district court abused its discretion in permitting the jury to take exhibit 36 into the jury room for use during deliberations. Pangborn also assigns, reordered and restated, that the court erred in admitting exhibits 37 and 38, that there was insufficient evidence to support the verdicts, and that he received excessive sentences. Because we find reversible error, we reach only the assignment of error regarding the demonstrative exhibit.

### IV. STANDARD OF REVIEW

[1] The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.<sup>3</sup>

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<sup>2</sup> See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

<sup>3</sup> *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

## V. ANALYSIS

### 1. USE OF DEMONSTRATIVE EXHIBIT DURING DELIBERATIONS

#### (a) Issue on Appeal

Pangborn argues that the district court abused its discretion in allowing the jury to take a demonstrative exhibit into the jury room for use during deliberations. The relevant demonstrative exhibit—exhibit 36—was the State’s “road map” of its case against Pangborn. Initially, the court admitted exhibit 36 for demonstrative purposes only. This occurred prior to the start of trial and out of the presence of the jury. At that time, Pangborn agreed to the admission of exhibit 36 for demonstrative purposes only. However, at the conclusion of evidence and over Pangborn’s objection, the court ruled upon its own motion that the jury would be allowed to take exhibit 36 into the jury room for deliberations. At no point during the trial itself or during final jury instructions did the court inform the jury that exhibit 36 was admitted for demonstrative purposes or provide a limiting instruction specific to exhibit 36. We must decide whether this was an abuse of the court’s discretion.

Pangborn does not challenge the actual admission of exhibit 36 into evidence for demonstrative purposes or its use during trial. He assigns error only to its use during deliberations. However, before reaching the question whether demonstrative exhibits can be used during jury deliberations, we must first clarify what is meant by the “admission” of a demonstrative exhibit.

#### (b) Admission of Demonstrative Exhibits

We historically have discussed the use of demonstrative exhibits in terms of admissibility. In *Benzel v. Keller Indus.*,<sup>4</sup> we adopted “principles for determining the admissibility of demonstrative exhibits in civil cases” and held that “demonstrative exhibits are admissible if they supplement the witness’

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<sup>4</sup> *Benzel v. Keller Indus.*, 253 Neb. 20, 28, 567 N.W.2d 552, 558 (1997).

spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.” Conversely, we stated that “[d]emonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant, or where the exhibit’s character is such that its probative value is substantially outweighed by the danger of unfair prejudice.”<sup>5</sup> Based upon these principles, we have discussed in other cases whether demonstrative exhibits are “admissible”<sup>6</sup> and whether their “admission” is an abuse of discretion.<sup>7</sup>

[2] But the use of such terminology can be misleading. Demonstrative exhibits are broadly defined as aids “offered to illustrate or explain the testimony of witnesses, including experts, or to present a summary or chronology of complex or voluminous documents.”<sup>8</sup> Our case law specifically defines demonstrative exhibits as those that “clarify some issue in the case.”<sup>9</sup> As these definitions highlight, demonstrative exhibits are defined by the purpose for which they are offered at trial—to aid or assist the jury in understanding the evidence or issues in a case.<sup>10</sup> “They are relevant . . . only because of the assistance they give to the trier in understanding other real, testimonial and documentary evidence.”<sup>11</sup> Thus, even though demonstrative exhibits may be “admitted” into evidence during the course of the trial, they serve a purpose distinct from other exhibits admitted for substantive and not merely demonstrative

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<sup>5</sup> *Id.*

<sup>6</sup> *State v. Daly*, 278 Neb. 903, 925, 775 N.W.2d 47, 66 (2009). Accord *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds*, *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

<sup>7</sup> *American Central City v. Joint Antelope Valley Auth.*, *supra* note 3, 281 Neb. at 756, 807 N.W.2d at 182. Accord, *State v. Daly*, *supra* note 6; *State v. Gutierrez*, *supra* note 6.

<sup>8</sup> 2 McCormick on Evidence § 214 at 18 (Kenneth S. Broun et al. eds., 7th ed. 2013).

<sup>9</sup> *Benzel v. Keller Indus.*, *supra* note 4, 253 Neb. at 28, 567 N.W.2d at 558.

<sup>10</sup> See 2 McCormick on Evidence, *supra* note 8.

<sup>11</sup> *Id.*, § 214 at 19.

purposes. For this reason, some courts refer to demonstrative exhibits as “pedagogical aid[s]”<sup>12</sup> or “pedagogical devices”<sup>13</sup> so as to highlight this difference in purpose.

[3] Due to the difference in purpose, an exhibit admitted for a demonstrative purpose—that is, to aid the jury—is not evidence in the same way that an exhibit admitted for a substantive purpose—that is, as proof of an underlying fact or occurrence—is evidence. Our case law does not state that demonstrative exhibits are not to be considered as substantive evidence. However, a majority of circuit courts have so held,<sup>14</sup> and the major evidence treatises agree.<sup>15</sup> We likewise agree with this proposition and now hold that exhibits admitted only for demonstrative purposes do not constitute substantive evidence.

### (c) Demonstrative Exhibits in Jury Deliberations

Just because demonstrative exhibits are not substantive evidence does not mean that they should be excluded automatically from jury deliberations. As mentioned earlier, the explicit purpose of a demonstrative exhibit is to aid the jury

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<sup>12</sup> See, e.g., *U.S. v. Milkiewicz*, 470 F.3d 390, 398 (1st Cir. 2006). See, also, *U.S. v. Buck*, 324 F.3d 786 (5th Cir. 2003).

<sup>13</sup> See, e.g., *U.S. v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998). See, also, *U.S. v. Harms*, 442 F.3d 367 (5th Cir. 2006); *U.S. v. Janati*, 374 F.3d 263 (4th Cir. 2004).

<sup>14</sup> See, e.g., *U.S. v. Milkiewicz*, *supra* note 12; *U.S. v. Harms*, *supra* note 13; *U.S. v. Janati*, *supra* note 13; *U.S. v. Bray*, *supra* note 13; *U.S. v. Wood*, 943 F.2d 1048 (9th Cir. 1991); *U.S. v. Casamento*, 887 F.2d 1141 (2d Cir. 1989); *Conford v. United States*, 336 F.2d 285 (10th Cir. 1964); *Ratner v. Arrington*, 111 So. 2d 82 (Fla. App. 1959); *Smith v. Ohio Oil Co.*, 10 Ill. App. 2d 67, 134 N.E.2d 526 (1956); *In re Estate of Lucitte*, No. L-10-1136, 2012 WL 362002 (Ohio App. Feb. 3, 2012) (unpublished opinion); *Christensen v. Cober*, 206 Or. App. 719, 138 P.3d 918 (2006); *Markey v. State*, 996 S.W.2d 226 (Tex. App. 1999); *State v. Lord*, 117 Wash. 2d 829, 822 P.2d 177 (1991) (en banc).

<sup>15</sup> See, 2 McCormick on Evidence, *supra* note 8; 4 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 611.02[2][a][vii] (Joseph M. McLaughlin ed., 2d ed. 2011).

in its consideration of the evidence and issues in a case.<sup>16</sup> Undoubtedly, in a complex case, demonstrative exhibits would be most helpful when the jury considers the totality of the evidence during deliberations. As the Seventh Circuit has stated, demonstrative exhibits “often are useful tools that enable the jury to visualize and organize the large volume of data produced by trial testimony.”<sup>17</sup>

Precisely because demonstrative exhibits can be exceedingly useful, many courts allow demonstrative exhibits to be used in jury deliberations under certain circumstances.<sup>18</sup> Although the Nebraska Court of Appeals has tangentially discussed matters pertinent to the use of demonstrative exhibits in jury deliberations, it did not reach the exact issue presented by the present appeal.<sup>19</sup> Thus, because this is an issue of first impression in Nebraska, we review the pertinent case law from other jurisdictions.

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<sup>16</sup> See 2 McCormick on Evidence, *supra* note 8.

<sup>17</sup> *United States v. Radtke*, 799 F.2d 298, 311 (7th Cir. 1986) (Flaum, Circuit Judge, concurring in part, and in part dissenting).

<sup>18</sup> See, e.g., *U.S. v. Milkiewicz*, *supra* note 12; *U.S. v. Harms*, *supra* note 13; *U.S. v. Salerno*, 108 F.3d 730 (7th Cir. 1997); *U.S. v. Johnson*, 54 F.3d 1150 (4th Cir. 1995); *U.S. v. Casamento*, *supra* note 14; *United States v. Scales*, 594 F.2d 558 (6th Cir. 1979); *United States v. Downen*, 496 F.2d 314 (10th Cir. 1974); *United States v. Warner*, 428 F.2d 730 (8th Cir. 1970); *Shane v. Warner Mfg. Corp.*, 229 F.2d 207 (3d Cir. 1956); *Rossell v. Volkswagen of America*, 147 Ariz. 160, 709 P.2d 517 (1985); *Williams v. First Security Bank of Searcy*, 293 Ark. 388, 738 S.W.2d 99 (1987); *Higgins v. L. A. Gas & Electric Co.*, 159 Cal. 651, 115 P. 313 (1911); *People v. Manley*, 133 Ill. App. 2d 882, 272 N.E.2d 411 (1971); *Pearson v. State*, 441 N.E.2d 468 (Ind. 1982); *State v. Yowell*, 513 S.W.2d 397 (Mo. 1974), (superseded by statute on other grounds as stated in *State v. Milliorn*, 794 S.W.2d 181 (Mo. 1990)); *In re Estate of Lucitte*, *supra* note 14; *Lord v. State*, Nos. A-1586, 1HA-S84-84CR, 1989 WL 1595110 (Alaska App. Sept. 6, 1989) (unpublished memorandum opinion); *State v. Evans*, No. 376614-4-I, 1998 WL 184909 (Wash. App. Apr. 20, 1998) (unpublished disposition listed at 90 Wash. App. 1028 (1998)).

<sup>19</sup> See *McFadden v. Winters & Merchant, Inc.*, 8 Neb. App. 870, 603 N.W.2d 31 (1999).

(i) *Approaches of Other Jurisdictions*

a. Federal Case Law

Allowing or disallowing the use of demonstrative exhibits in deliberations usually is a matter of discretion.<sup>20</sup> Rule 611(a) of the Federal Rules of Evidence—the federal rule governing the mode of presenting evidence in court—is regularly cited as giving courts general discretion over the use of demonstrative exhibits during trial.<sup>21</sup>

Prior to its restyling in 2011, Fed. R. Evid. 611(a) was identical to Neb. Evid. R. 611(1), Neb. Rev. Stat. § 27-611(1) (Reissue 2008). The 2011 amendments to the Federal Rules of Evidence were meant to be stylistic only.<sup>22</sup> Therefore, federal rule 611(a) remains substantively identical to § 27-611(1).

[4] Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.<sup>23</sup> We thus begin by looking to the federal courts for guidance on the use of demonstrative exhibits during jury deliberations.

Of the 13 circuits, 10 permit demonstrative exhibits to be used by the jury during deliberations when certain circumstances are present. As will be explained below, these circumstances vary from the use of limiting instructions or other safeguards to consent of the parties.

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<sup>20</sup> See, e.g., *U.S. v. Milkiewicz*, *supra* note 12; *U.S. v. Salerno*, *supra* note 18; *United States v. Downen*, *supra* note 18; *Shane v. Warner Mfg. Corp.*, *supra* note 18; *U.S. v. Hollie*, No. 98-1103, 1999 WL 1021860 (6th Cir. Nov. 3, 1999) (unpublished disposition listed in table of “Decisions Without Published Opinions” at 198 F.3d 248 (6th Cir. 1999)).

<sup>21</sup> See, e.g., *U.S. v. Irvin*, 682 F.3d 1254 (10th Cir. 2012); *U.S. v. Milkiewicz*, *supra* note 12; *U.S. v. Taylor*, 210 F.3d 311 (5th Cir. 2000); *U.S. v. Salerno*, *supra* note 18; *U.S. v. Johnson*, *supra* note 18; *U.S. v. Pinto*, 850 F.2d 927 (2d Cir. 1988); *U.S. v. Possick*, 849 F.2d 332 (8th Cir. 1988); *United States v. Gardner*, 611 F.2d 770 (9th Cir. 1980); *United States v. Scales*, *supra* note 18.

<sup>22</sup> See Fed. R. Evid. 611(a), advisory committee note on 2011 amendment.

<sup>23</sup> *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003).

The most common prerequisite for the use of demonstrative exhibits during jury deliberations is the use of safeguards against prejudice. In the 2d,<sup>24</sup> 3d,<sup>25</sup> and 10th<sup>26</sup> Circuits, the only requirement for sending demonstrative exhibits to the jury room is the giving of a limiting instruction. The First Circuit also requires that trial courts employ adequate safeguards against prejudice, such as jury instructions, editing to remove prejudicial content, and opportunity for the exhibit's opponent "to expose his concerns to the jury."<sup>27</sup> In addition, trial courts in the First Circuit must determine that demonstrative exhibits would be useful to the jury.<sup>28</sup>

The remaining circuits that allow demonstrative exhibits to be used in jury deliberations each employ different approaches. The Fourth Circuit allows demonstrative exhibits to go to the jury during deliberations following the "proper admission of the summary chart into evidence."<sup>29</sup> The Fifth Circuit requires only consent of the parties.<sup>30</sup> The 11th Circuit has the most restrictive rule regarding the use of demonstrative exhibits in jury deliberations. It has held that it is an abuse of discretion to send demonstrative exhibits to the jury for use in deliberations in all circumstances except three: (1) where the exhibit is not hearsay, (2) where extensive cross-examination is allowed, or (3) where chain of custody is a contested issue.<sup>31</sup> In contrast to the 11th Circuit's precise rule, the 6th,<sup>32</sup> 7th,<sup>33</sup> and

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<sup>24</sup> See *U.S. v. Casamento*, *supra* note 14.

<sup>25</sup> See *Shane v. Warner Mfg. Corp.*, *supra* note 18.

<sup>26</sup> See, e.g., *United States v. Downen*, *supra* note 18.

<sup>27</sup> *U.S. v. Milkiewicz*, *supra* note 12, 470 F.3d at 400.

<sup>28</sup> See *id.*

<sup>29</sup> *U.S. v. Johnson*, *supra* note 18, 54 F.3d at 1161 n.11.

<sup>30</sup> See, e.g., *U.S. v. Harms*, *supra* note 13; *U.S. v. Taylor*, *supra* note 21.

<sup>31</sup> See *U.S. v. Pendas-Martinez*, 845 F.2d 938 (11th Cir. 1988).

<sup>32</sup> See, e.g., *United States v. Scales*, *supra* note 18; *U.S. v. Hollie*, *supra* note 20.

<sup>33</sup> See, e.g., *U.S. v. Salerno*, *supra* note 18; *United States v. Bernard*, 287 F.2d 715 (7th Cir. 1961).

8th<sup>34</sup> Circuits sometimes allow pedagogical exhibits to go to the jury during deliberations, but have no consistent rule. At one time or another, both the Seventh<sup>35</sup> and Eighth<sup>36</sup> Circuits have required limiting instructions.

In summary, although there is no uniform approach among the circuit courts, the use of limiting instructions is the most prevalent. Indeed, in the Fourth,<sup>37</sup> Fifth,<sup>38</sup> and Sixth<sup>39</sup> Circuits, limiting instructions or other safeguards must accompany demonstrative exhibits even when they are merely used or displayed in trial without being sent to the jury during deliberations.

#### b. Case Law From Other States

Other states do not appear to have a unified approach to the use of demonstrative exhibits in jury deliberations. Courts in Massachusetts,<sup>40</sup> Missouri,<sup>41</sup> Pennsylvania,<sup>42</sup> and Wisconsin<sup>43</sup> leave the issue solely up to a trial judge's discretion. Several states allow demonstrative exhibits to be used during jury deliberations when appropriate safeguards are in place. Ohio requires limiting instructions.<sup>44</sup> In Illinois, the trial judge can send a demonstrative exhibit to the jury room once he or she

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<sup>34</sup> See, e.g., *U.S. v. Possick*, *supra* note 21; *United States v. Warner*, *supra* note 18.

<sup>35</sup> See *United States v. Bernard*, *supra* note 33.

<sup>36</sup> See *U.S. v. Possick*, *supra* note 21.

<sup>37</sup> See, e.g., *U.S. v. Johnson*, *supra* note 18.

<sup>38</sup> See, e.g., *U.S. v. Ollison*, 555 F.3d 152 (5th Cir. 2009); *U.S. v. Ogba*, 526 F.3d 214 (5th Cir. 2008); *U.S. v. Taylor*, *supra* note 21.

<sup>39</sup> See, e.g., *U.S. v. Bray*, *supra* note 13; *United States v. Scales*, *supra* note 18.

<sup>40</sup> See *Com. v. Walter*, 10 Mass. App. 255, 406 N.E.2d 1304 (1980).

<sup>41</sup> See *State v. Yowell*, *supra* note 18.

<sup>42</sup> See *Commonwealth v. Moore*, 443 Pa. 364, 279 A.2d 179 (1971).

<sup>43</sup> See *State v. Olson*, 217 Wis. 2d 730, 579 N.W.2d 802 (Wis. App. 1998).

<sup>44</sup> See *In re Estate of Lucitte*, *supra* note 14.

has determined that the exhibit is not prejudicial.<sup>45</sup> Otherwise, the majority of states have not addressed this issue.

(ii) *Application to Nebraska Law*

a. Judicial Discretion of  
Trial Courts

As the foregoing discussion revealed, a common approach taken by many courts in other jurisdictions to the use of demonstrative exhibits in jury deliberations is to allow such use at the trial judge's discretion. This approach is consistent with Nebraska jurisprudence, which frequently addresses evidentiary matters to the trial judge's discretion.

[5] In Nebraska, "[a] trial judge has broad discretion over the conduct of a trial."<sup>46</sup> It is the judge's statutory duty to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence."<sup>47</sup> The judge also possesses "inherent powers" that "include the broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial."<sup>48</sup>

[6] In practice, a trial judge is called upon to make many decisions during the course of a trial based upon this broad discretion. The Nebraska Evidence Rules explicitly place many evidentiary matters at the discretion of the trial judge.<sup>49</sup> And the exercise of discretion "is implicit in decisions to admit evidence based on relevancy or admissibility."<sup>50</sup> When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of

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<sup>45</sup> See *People v. Manley*, *supra* note 18.

<sup>46</sup> *Connelly v. City of Omaha*, 278 Neb. 311, 319, 769 N.W.2d 394, 400 (2009).

<sup>47</sup> § 27-611(1).

<sup>48</sup> *Schindler v. Walker*, 256 Neb. 767, 779, 592 N.W.2d 912, 920 (1999).

<sup>49</sup> See, e.g., Neb. Evid. R. 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 2008); Neb. Evid. R. 106(2), Neb. Rev. Stat. § 27-106(2) (Reissue 2008); Neb. Evid. R. 201(3), Neb. Rev. Stat. § 27-201(3) (Reissue 2008); § 27-611(2); Neb. Evid. R. 705, Neb. Rev. Stat. § 27-705 (Reissue 2008).

<sup>50</sup> *Sack v. Castillo*, 278 Neb. 156, 164, 768 N.W.2d 429, 436 (2009).

discretion.<sup>51</sup> In addition, a trial judge is given the discretion to determine when a sufficient basis has been laid for lay opinion testimony,<sup>52</sup> when photographs can be admitted into evidence,<sup>53</sup> and when demonstrative exhibits can be used in trial.<sup>54</sup>

When it comes to matters regarding the jury, under Nebraska case law, the trial judge has discretion to allow the jury to reexamine evidence during deliberations.<sup>55</sup> Under this rule, “trial courts have broad discretion in allowing the jury to have unlimited access to properly received exhibits that constitute substantive evidence of the defendant’s guilt.”<sup>56</sup>

[7] In accordance with this broad discretion already accorded to trial courts, particularly in evidentiary matters, we believe that the submission of demonstrative exhibits to the jury during deliberations should be left to the discretion of the trial court. Accordingly, we hold that a trial judge may exercise his or her broad judicial discretion to allow or disallow the use of demonstrative exhibits during jury deliberations.

#### b. Limits of Discretion

This discretion, however, is not unlimited. Despite their potential usefulness, demonstrative exhibits also carry the potential to prejudice the party against whom such exhibits are used.

If used improperly, demonstrative exhibits can distract the jury from considering all of the evidence presented, causing them instead to unfairly emphasize only portions of the evidence.<sup>57</sup> If all parties to a case do not submit demonstrative exhibits, the jury may be tempted to focus more heavily on the

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<sup>51</sup> *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009).

<sup>52</sup> See *Childers v. Phelps County*, 252 Neb. 945, 568 N.W.2d 463 (1997).

<sup>53</sup> See *Steele v. Sedlacek*, 267 Neb. 1, 673 N.W.2d 1 (2003).

<sup>54</sup> See *American Central City v. Joint Antelope Valley Auth.*, *supra* note 3.

<sup>55</sup> See *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

<sup>56</sup> *State v. Pischel*, 277 Neb. 412, 427, 762 N.W.2d 595, 607 (2009).

<sup>57</sup> See, e.g., *United States v. Abbas*, 504 F.2d 123 (9th Cir. 1974); *State v. Lord*, *supra* note 14.

evidence to which it has “easy reference.”<sup>58</sup> Because they are often prepared specifically for use in litigation, demonstrative exhibits can be tempting vehicles for conveying prejudicial language and assumptions<sup>59</sup> or inadmissible evidence<sup>60</sup> to the jury.

Furthermore, if not instructed on the limited purposes of demonstrative exhibits, the jury may assume that demonstrative exhibits constitute primary proof of the information contained therein, leading the jury to shirk its duty to determine the truth and accuracy of the evidence.<sup>61</sup> The jury may attribute undue weight or credibility to evidence summarized or illustrated in demonstrative exhibits.<sup>62</sup> Or a jury may find the simplicity with which demonstrative exhibits present complex or technical information to be compelling and persuasive.<sup>63</sup> On the other hand, demonstrative exhibits that are not properly explained may ultimately confuse or mislead the jury.<sup>64</sup>

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<sup>58</sup> See, e.g., *U.S. v. Casoni*, 950 F.2d 893, 916 (3d Cir. 1991). Accord, *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957); *Steele v. United States*, 222 F.2d 628 (5th Cir. 1955); *Thomas v. State*, 259 Ind. 537, 289 N.E.2d 508 (1972) (superseded by rule on other grounds as stated in *Litherland v. McDonnell*, 796 N.E.2d 1237 (Ind. App. 2003)).

<sup>59</sup> See, e.g., *U.S. v. Irvin*, *supra* note 21; *U.S. v. Taylor*, *supra* note 21; *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983) (superseded by statute on other grounds as stated in *U.S. v. Sun-Diamond Growers of California*, 941 F. Supp. 1262 (D.D.C. 1996)); *U.S. v. Gazie*, Nos. 83-1851, 83-1852, 83-1860, 1986 WL 16498 (6th Cir. Feb. 26, 1986) (unpublished disposition listed in table of “Decisions Without Published Opinions” at 786 F.2d 1166 (6th Cir. 1986)); *Vanlandingham v. Gartman*, 236 Ark. 504, 367 S.W.2d 111 (1963).

<sup>60</sup> See, e.g., *United States v. Lemire*, *supra* note 59.

<sup>61</sup> See, e.g., *U.S. v. Baker*, 10 F.3d 1374 (9th Cir. 1993), *overruled on other grounds*, *U.S. v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); *United States v. Scales*, *supra* note 18; *Baines v. United States*, 426 F.2d 833 (5th Cir. 1970); *United States v. Ellenbogen*, 365 F.2d 982 (2d Cir. 1966).

<sup>62</sup> See, e.g., *Sanchez v. United States*, 293 F.2d 260 (8th Cir. 1961); *Smith v. Ohio Oil Co.*, *supra* note 14.

<sup>63</sup> See, e.g., *U.S. v. Irvin*, *supra* note 21; *Elder v. United States*, 213 F.2d 876 (5th Cir. 1954).

<sup>64</sup> See, e.g., *United States v. Citron*, 783 F.2d 307 (2d Cir. 1986); *U.S. v. Gazie*, *supra* note 59.

[8] Given the possibility for such forms of prejudice, a trial judge must carefully consider the potential prejudice that may arise from the use of demonstrative exhibits during jury deliberations. Each demonstrative exhibit must be considered individually, because both the usefulness of a demonstrative exhibit and the potential prejudice arising from its use will depend on the form and substance of each particular exhibit. We note that a trial court is already required to weigh these considerations before allowing the use of demonstrative exhibits in trial.<sup>65</sup> We now hold that the trial judge must do so again before allowing the jury to use a demonstrative exhibit during deliberations. It is an abuse of discretion for a trial judge to send a demonstrative exhibit to the jury for use in deliberations without first weighing the potential prejudice in allowing such use against the usefulness of the exhibit and employing adequate safeguards to prevent prejudice.

### c. Common Safeguards

Significantly, many of the dangers in allowing the use of demonstrative exhibits in jury deliberations stem from the improper use of such exhibits or a disregard for their limited purpose. As such, these dangers often can be avoided by the use of limiting instructions that advise a jury of the limited purpose for which demonstrative exhibits should be employed. As noted earlier, the limiting instruction is the most prevalent safeguard used by the circuit courts. Moreover, several circuits have held that limiting instructions can limit<sup>66</sup> or even eliminate<sup>67</sup> the harms posed by demonstrative exhibits.

In addition to jury instructions, there are other safeguards that can be employed to limit the prejudice that will result from allowing the jury to use demonstrative exhibits in deliberations. These safeguards include requiring the proponent of the exhibit to lay foundation for its use outside the presence

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<sup>65</sup> See *State v. Daly*, *supra* note 6.

<sup>66</sup> See, e.g., *U.S. v. Bishop*, 264 F.3d 535 (5th Cir. 2001); *U.S. v. Francis*, 131 F.3d 1452 (11th Cir. 1997).

<sup>67</sup> See, e.g., *United States v. Cox*, 633 F.2d 871 (9th Cir. 1980); *Sanseverino v. United States*, 321 F.2d 714 (10th Cir. 1963).

of the jury,<sup>68</sup> having the individual who prepared the exhibit testify concerning the exhibit,<sup>69</sup> allowing extensive cross-examination of the individual who prepared the exhibit,<sup>70</sup> giving the opponent of the exhibit the opportunity to examine the exhibit prior to its admission and to identify errors,<sup>71</sup> excising prejudicial content prior to submitting the exhibit to the jury,<sup>72</sup> and giving the opposing side the opportunity to present its own exhibit.<sup>73</sup>

As noted above, the prejudicial potential of any particular demonstrative exhibit will vary depending on the exhibit. Having presided over the presentation of evidence, the trial judge should exercise sound discretion to ensure that adequate safeguards are present to prevent that prejudice.

#### (d) Application to Instant Appeal

In the instant case, the district court employed no safeguards against prejudice before allowing the jury to use exhibit 36 during its deliberations. Exhibit 36 was “admitted” for use during trial in a pretrial conference, employed by the State in its opening statement, and used repeatedly throughout the trial. Yet, the court never informed the jury that exhibit 36 had been admitted for demonstrative purposes only or explained the proper purposes for which the jury might use a demonstrative exhibit. Although the State erroneously informed the jury in its opening statement that Pangborn had “stipulated” to exhibit 36, the court did not correct the implication that Pangborn agreed

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<sup>68</sup> See, e.g., *U.S. v. Baker*, *supra* note 61; *United States v. Lemire*, *supra* note 59; *United States v. Bartone*, 400 F.2d 459 (6th Cir. 1968).

<sup>69</sup> See, e.g., *United States v. Cox*, *supra* note 67; *United States v. Ware*, *supra* note 58; *Lloyd v. United States*, 226 F.2d 9 (5th Cir. 1955); *State v. Lord*, *supra* note 14.

<sup>70</sup> See, e.g., *U.S. v. Baker*, *supra* note 61; *United States v. Lemire*, *supra* note 59; *State v. Lord*, *supra* note 14; *State v. Olson*, *supra* note 43.

<sup>71</sup> See, e.g., *U.S. v. Baker*, *supra* note 61.

<sup>72</sup> See, e.g., *U.S. v. Irvin*, *supra* note 21; *Stachowiak v. Subczynski*, 411 Mich. 459, 307 N.W.2d 677 (1981) (per curiam).

<sup>73</sup> See, e.g., *U.S. v. Baker*, *supra* note 61; *State v. Lord*, *supra* note 14.

with the substantive content of the exhibit or take the opportunity to instruct the jury regarding the proper use of the exhibit. And even when submitting the case for the jury's consideration and sending all the exhibits to the jury room, the court failed to provide a jury instruction that exhibit 36 was admitted for demonstrative purposes only and specifically instruct the jury as to the proper purpose for use of the exhibit. In effect, the court gave the jury unlimited access to exhibit 36—a clear and concise “road map” of the State's entire case against Pangborn and upon which the State had relied significantly during the presentation of evidence—without limiting or guiding the jury's use of that exhibit.

We conclude that the district court abused its discretion in permitting the jury to use exhibit 36 during its deliberations without providing a limiting instruction. That is not to say that a limiting instruction is always required; however, except in the rare case where other safeguards combine to make the limited purpose of the demonstrative exhibit abundantly clear to the jury, an appropriate limiting instruction will be necessary to avoid unfair prejudice.

(e) Harmless Error  
Analysis

[9-12] Errors, other than structural errors, which occur within the trial and sentencing process, are subject to harmless error review.<sup>74</sup> Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.<sup>75</sup> In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.<sup>76</sup> Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that

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<sup>74</sup> *State v. Pathod*, 269 Neb. 155, 690 N.W.2d 784 (2005).

<sup>75</sup> *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

<sup>76</sup> *Id.*

occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.<sup>77</sup>

Due to the complete absence of safeguards employed in the instant case when erroneously submitting the demonstrative exhibit to the jury, we cannot say that this error was harmless. Because the jury was never informed that exhibit 36 was admitted for only demonstrative purposes, it had no way of knowing that the standard instruction on exhibits admitted for limited purposes applied to the exhibit. And without any sort of guidance from the district court, the jury did not know that exhibit 36 was not substantive evidence of Pangborn's guilt.

The State argues that the jury's acquittal of Pangborn on 1 of 10 counts reflects that "the jury was not unduly influenced by Exhibit 36."<sup>78</sup> We find this argument to be logically flawed. Even assuming that the acquittal on one count shows that the jury did not take exhibit 36 as proof of Pangborn's guilt on that single count, each count was based on separate factual allegations. A verdict of "not guilty" on one count has no relation to the other counts and does not preclude the possibility that exhibit 36 substantially influenced the jury's decision on the other counts.

We cannot say that the jury's guilty verdicts were surely unattributable to the act of sending exhibit 36 to the jury during deliberations without a proper limiting instruction. We reverse Pangborn's convictions and remand the cause for a new trial.

## 2. NEW TRIAL

[13] The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a

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<sup>77</sup> *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

<sup>78</sup> Brief for appellee at 11.

guilty verdict.<sup>79</sup> Having reviewed the entirety of the evidence admitted in this case, we note that numerous individuals testified that they witnessed the crimes of which Pangborn was charged. There also was evidence that called into question Pangborn's alibi defense. We find that there was sufficient evidence to sustain the verdict on each count where he was found guilty. Therefore, retrial is permissible on those nine counts.

### 3. OTHER ASSIGNMENTS OF ERROR

[14] Having found that the district court's decision to allow the jury to use exhibit 36 during deliberations without a limiting instruction or other safeguards was reversible error, we do not reach any of Pangborn's other assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.<sup>80</sup>

[15] Because we do not believe that the evidentiary foundation for exhibits 37 and 38 will be identical upon retrial, we do not discuss Pangborn's arguments regarding these two exhibits. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.<sup>81</sup> We think it is quite likely upon retrial and in the light of Pangborn's arguments in this appeal that the State may choose to offer other or additional foundational evidence in support of these exhibits. Thus, it is unlikely that the issues will arise in the same posture, and we decline to address the issue.

## VI. CONCLUSION

We hold that a trial judge may exercise his or her broad judicial discretion to allow or disallow the use of demonstrative exhibits during jury deliberations. But given the prejudice

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<sup>79</sup> *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

<sup>80</sup> *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013).

<sup>81</sup> *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

that can arise from the use of demonstrative exhibits in jury deliberations, this discretion is not unlimited. Due to the lack of limiting instructions and the complete absence of safeguards employed in the instant case, the district court abused its discretion in allowing the jury to use the State's "road map" of its case—admitted for demonstrative purposes only—during deliberations without giving a limiting instruction. We find this error to be prejudicial. Therefore, we reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY and MILLER-LERMAN, JJ., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, v. EDGAR J.  
CHIROY OSORIO, APPELLANT.

837 N.W.2d 66

Filed August 2, 2013. No. S-12-580.

1. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
2. **Constitutional Law: Postconviction.** A defendant seeking relief under the post-conviction statutes must (1) file a verified motion in the court which imposed the prior sentence, stating the grounds relied upon and asking for relief; (2) be in custody under sentence; and (3) allege a denial or infringement of the defendant's constitutional rights.
3. \_\_\_\_: \_\_\_\_\_. A "manifest injustice" common-law claim must be founded on a constitutional right that cannot and never could have been vindicated under the Nebraska Postconviction Act or by any other means.
4. **Judgments: Appeal and Error.** An expression of the trial court's reasoning is always encouraged and assists appellate review. Yet, a correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.

Appeal from the District Court for Dodge County: GEOFFREY C. HALL, Judge. Affirmed.

Bilal A. Khaleeq and Daniel S. Reeker, of Khaleeq Law Firm, L.L.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

McCORMACK, J.

### NATURE OF CASE

Edgar J. Chiroy Osorio appeals from the district court's dismissal of his motion to withdraw a plea of guilty and to vacate a 2002 conviction, for which he has already served his sentence. Chiroy Osorio's claims stem from the failure to advise him of the possible immigration consequences of that plea. Chiroy Osorio is not a U.S. citizen and was deported as a result of the 2002 conviction. He reentered the United States and alleges that he again faces deportation as a result of the 2002 plea.

### BACKGROUND

In June 2002, pursuant to a plea agreement, Chiroy Osorio pled no contest to attempted first degree arson. He was sentenced on July 22, 2002, to a term of 20 to 24 months' incarceration, with credit for 101 days served. Chiroy Osorio was discharged from prison on April 11, 2003, and was thereafter removed from the United States.

At the time of the 2002 plea, Neb. Rev. Stat. § 29-1819.02 (Reissue 2008) was not yet in effect. That statute requires a special advisement by the court before accepting a plea of guilty or nolo contendere from a noncitizen. Section 29-1819.02 became effective 2 days before Chiroy Osorio's sentencing. According to Chiroy Osorio's affidavit, neither the district court nor defense counsel advised Chiroy Osorio of the possible immigration consequences of his plea at any time before the conviction became final.

Approximately 10 years after his plea, on April 16, 2012, Chiroy Osorio filed a motion to withdraw his plea of no contest and vacate the 2002 conviction. Chiroy Osorio alleged that the district court had authority to grant such a motion under

either § 29-1819.02, the Nebraska Postconviction Act,<sup>1</sup> or the common-law right recognized in *State v. Gonzalez*.<sup>2</sup> Chiroy Osorio alleged that his plea and conviction were obtained in violation of his due process rights and that trial counsel was ineffective because he was not advised of the immigration consequences of his guilty plea. Chiroy Osorio alleged that had he been properly advised, he would not have made such a plea. Chiroy Osorio alleged that as a result of the ineffectiveness of his 2002 trial counsel, Chiroy Osorio is currently subject to removal proceedings and denial of naturalization under the Immigration and Nationality Act.<sup>3</sup>

At a hearing on the motion, Chiroy Osorio's counsel explained that Chiroy Osorio had reentered the United States and was currently facing federal charges. It was only when Chiroy Osorio retained his current counsel that he discovered any potential claim related to the 2002 plea. The only evidence offered by Chiroy Osorio was his own affidavit. He averred that his attorney did not advise him his plea would have immigration consequences and that he would never have pled guilty had he known how his plea would affect his immigration status. The court also took judicial notice of its prior proceedings, in which it had failed to advise Chiroy Osorio of the immigration consequences of his plea.

The State moved to dismiss the motion to withdraw the plea. The State argued that there was no cause of action under § 29-1819.02, because the plea was entered before July 20, 2002; that Chiroy Osorio had waived any due process claims by entering the plea; that Chiroy Osorio was not entitled to postconviction relief because he was no longer in custody; and that Chiroy Osorio's affidavit was insufficient evidence of ineffective assistance of counsel to overcome a motion to dismiss.

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<sup>1</sup> Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012).

<sup>2</sup> *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013) (original opinion found at 283 Neb. 1, 807 N.W.2d 759 (2012), withdrawn on motion for rehearing).

<sup>3</sup> See 8 U.S.C. § 1101 et seq. (2006 & Supp. V 2011).

The court took the matter under advisement. Subsequently, in a written order in which it did not expressly state its reasoning, the district court denied Chiroy Osorio's motion to withdraw the plea and vacate the conviction. Chiroy Osorio appeals.

### ASSIGNMENTS OF ERROR

Chiroy Osorio assigns that the district court erred (1) when it denied his motion to withdraw his plea and vacate his conviction because his due process rights were violated when he was not advised of the immigration consequences of his plea, (2) when it determined that he could not withdraw his plea even though the court did not read the statutory advisement of § 29-1819.02 before sentencing him, and (3) when it failed to explain with any detail why it denied his motion as it places an unnecessarily unreasonable burden on Chiroy Osorio during his appeals process.

### STANDARD OF REVIEW

[1] To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.<sup>4</sup>

### ANALYSIS

Chiroy Osorio attempted to collaterally attack his plea under (1) the postconviction statute, (2) § 29-1819.02, and (3) the common-law "manifest injustice" procedure recognized in *Gonzalez*.<sup>5</sup> The district court correctly determined that none of these avenues provide a basis for relief in this case.

[2] A defendant seeking relief under the postconviction statutes must (1) file a verified motion in the court which imposed the prior sentence, stating the grounds relied upon and asking for relief; (2) be in custody under sentence; and (3) allege a denial or infringement of the defendant's constitutional rights.<sup>6</sup>

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<sup>4</sup> *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001).

<sup>5</sup> *State v. Gonzalez*, *supra* note 2, 285 Neb. at 947, 830 N.W.2d at 509.

<sup>6</sup> See § 29-3001. See, also, *State v. Miller*, 6 Neb. App. 363, 574 N.W.2d 519 (1998).

Chiroy Osorio failed to allege in his postconviction motion that he was in custody. And at the hearing on his motion, Chiroy Osorio presented no evidence that he was in custody. Because he failed to demonstrate he was in custody, the lower court could not grant postconviction relief.<sup>7</sup>

Chiroy Osorio has no claim under § 29-1819.02, because his plea was accepted before July 20, 2002. Section 29-1819.02(3) states in part:

With respect to pleas accepted prior to July 20, 2002, it is not the intent of the Legislature that a court's failure to provide the advisement required by subsection (1) of this section should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid.

Although that subsection also states that nothing therein “shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea,” we held in *State v. Rodriguez-Torres*<sup>8</sup> that this language did not create a new statutory procedure pursuant to which a plea entered before July 20, 2002, could be withdrawn after the person convicted of the crime had already served his sentence. And the Legislature has acquiesced in this interpretation.<sup>9</sup> Section § 29-1819.02, therefore, confers no basis for relief for the 2002 plea.

[3] A “manifest injustice” common-law claim must be founded on a constitutional right that cannot and never could have been vindicated under the Nebraska Postconviction Act or by any other means.<sup>10</sup> Chiroy Osorio seeks to vindicate the constitutional right set forth in *Padilla v. Kentucky*.<sup>11</sup> In *Padilla*, the U.S. Supreme Court held that in order to satisfy

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<sup>7</sup> See *State v. Miller*, *supra* note 6.

<sup>8</sup> *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008). See, also, *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

<sup>9</sup> See *State v. Policky*, 285 Neb. 612, 828 N.W.2d 163 (2013).

<sup>10</sup> *State v. Gonzalez*, *supra* note 2, 285 Neb. at 947, 830 N.W.2d at 509.

<sup>11</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

the Sixth Amendment standards of competent representation, counsel must inform the client whether a plea carries a risk of deportation.<sup>12</sup>

Because Chiroy Osorio was not in custody during any relevant time period, he never could have vindicated his claimed constitutional right under the Nebraska Postconviction Act.<sup>13</sup> And there is currently no other means to vindicate a *Padilla* right. However, the *Padilla* right Chiroy Osorio seeks to vindicate does not apply to the 2002 plea.

The U.S. Supreme Court in *Chaidez v. U.S.*<sup>14</sup> held that *Padilla* announced a new rule within the meaning of *Teague v. Lane*.<sup>15</sup> Thus, defendants whose convictions became final before *Padilla* could not benefit from its holding.<sup>16</sup> Stated another way, the *Padilla* right is not retroactive.<sup>17</sup>

Chiroy Osorio's conviction became final nearly a decade before *Padilla*. The district court properly denied Chiroy Osorio's motion to withdraw his plea, because the constitutional right under which Chiroy Osorio claimed manifest injustice was inapplicable as a matter of law.

[4] Chiroy Osorio separately assigns as error the failure of the district court to explain its reasoning in its order denying his motion to withdraw his 2002 plea. An expression of the trial court's reasoning is always encouraged and assists appellate review. Yet, a correct result will not be set aside merely because the lower court applied the wrong reasoning in reaching that result.<sup>18</sup> There are no statutes, rules, or case law which would require setting aside a correct result simply because the lower court failed to articulate its reasoning. Given the clarity of the U.S. Supreme Court's holding in *Chaidez* and Chiroy

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<sup>12</sup> *Id.*

<sup>13</sup> See § 29-3001(4)(d).

<sup>14</sup> *Chaidez v. U.S.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

<sup>15</sup> *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

<sup>16</sup> *Id.*

<sup>17</sup> See *id.*

<sup>18</sup> See, e.g., *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012); *Keithley v. Black*, 239 Neb. 685, 477 N.W.2d 806 (1991).

Osorio's failure to so much as allege the necessary elements of relief under the postconviction statutes or § 29-1819.02, we find the district court's failure to articulate its reasoning inconsequential.

### CONCLUSION

We affirm the district court's denial of Chiroy Osorio's motion to withdraw his plea and vacate his conviction.

AFFIRMED.

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STEVEN BANKS ET AL., EACH AND ALL AS INDIVIDUALS, PROPERTY OWNERS, TAXPAYERS, AND AS SUPERVISORS SERVING DISTRICTS 1 THROUGH 7, ALL OF THE COUNTY OF KNOX, AND COUNTY OF KNOX, STATE OF NEBRASKA, APPELLEES AND CROSS-APPELLANTS, V. DAVE HEINEMAN, GOVERNOR, ET AL., APPELLANTS AND CROSS-APPELLEES.

837 N.W.2d 70

Filed August 2, 2013. No. S-12-723.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Taxation: Words and Phrases.** An excise tax is a tax imposed on the manufacture, sale, or use of goods or on an occupation or activity, and is measured by the extent to which a privilege is exercised by the taxpayer, without regard to the nature or value of the taxpayer's assets.
4. **Taxation.** An excise tax is imposed upon the performance of an act.
5. \_\_\_\_\_. An excise tax includes taxes sometimes designated by statute or referred to as "privilege taxes," "license taxes," "occupation taxes," and "business taxes."
6. **Taxation: Property: Valuation.** A property tax is levied on real or personal property, with the amount of the tax usually dependent upon the value of the property.
7. **Constitutional Law: Intent.** Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.

8. **Constitutional Law.** It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.
9. **Constitutional Law: Courts: Intent.** In ascertaining the intent of a constitutional provision from its language, a court may not supply any supposed omission, or add words to or take words from the provision as framed.
10. **Constitutional Law.** The Nebraska Constitution, as amended, must be read as a whole.
11. **Constitutional Law: Taxation.** The constitutional prohibition against commutation of taxes set forth in Neb. Const. art. VIII, § 4, does not apply to an excise tax.
12. **Constitutional Law: Statutes: Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors to a specific class. A legislative act constitutes special legislation if it either (1) creates an arbitrary and unreasonable method of classification or (2) creates a permanently closed class.
13. **Special Legislation: Words and Phrases.** A closed class is one that limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development.
14. **Special Legislation.** The Legislature has the power to enact special legislation where the subject or matters sought to be remedied could not be properly remedied by a general law and where the Legislature has a reasonable basis for the enactment of the law.

Appeal from the District Court for Lancaster County:  
PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and L. Jay Bartel for appellants.

David A. Domina, of Domina Law Group, P.C., L.L.O., and John Thomas, Knox County Attorney, for appellees.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MILLER-LEMAN, and CASSEL, JJ., and INBODY, Chief Judge.

STEPHAN, J.

Effective July 15, 2010, the Nebraska Legislature changed the manner in which wind energy generation facilities in Nebraska are taxed. The change exempted personal property used by such facilities from the personal property tax and imposed a new tax based on a facility's nameplate capacity. The legislation allowed taxpayers who had paid personal

property tax prior to 2010 to claim a credit against nameplate capacity taxes assessed for 2010 and subsequent years. The appellees, who are taxpayers and residents of Knox County, Nebraska, brought this action challenging the constitutionality of the credit. The district court for Lancaster County held the credit was an unconstitutional commutation of taxes. We reverse, because the credit is not unconstitutional.

### I. BACKGROUND

The plaintiffs below and appellees herein are Steven Banks, Jim Fuchtmann, Jerry Hanefeldt, Norman Mackeprang, Virgil Miller, Marty O'Connor, and Rayder Swanson. Each owns real estate and personal property in Knox County and pays taxes on such property. Each is also a member of the Knox County Board of Supervisors. The county itself is also a named plaintiff. We shall refer to them collectively as the "Knox Countians." The defendants below and appellants herein are Dave Heineman, Governor of the State of Nebraska; Don Stenberg, the Nebraska State Treasurer; and Douglas A. Ewald, the Nebraska State Tax Commissioner. We shall refer to them collectively as the "State officials."

The Knox Countians filed a complaint seeking declaratory and injunctive relief with respect to the nameplate capacity tax credit authorized by Neb. Rev. Stat. § 77-6203(5)(b) (Cum. Supp. 2012). The complaint alleged that the credit was unconstitutional and void because it operated to commute a tax in violation of Neb. Const. art. VIII, § 4, and constituted special legislation prohibited by Neb. Const. art. III, § 18. The State officials filed an answer in which they denied that the credit was unconstitutional.

The case was tried on stipulated facts, which we summarize here. Prior to 2010, Nebraska wind energy generation facilities, including towers and turbines, were taxed as personal property and depreciated over a 5-year period. After the 5-year period, no further taxes were collected on the facilities. This taxing system imposed steep upfront costs on wind generators and created budget problems for local governments. To address these issues and as part of legislation passed to encourage the development of wind generation facilities in Nebraska, the

Nebraska Legislature enacted L.B. 1048, which was signed into law and became effective on July 15, 2010.<sup>1</sup>

Section 11 of L.B. 1048 exempted from taxation any personal property “used directly in the generation of electricity using wind as the fuel source.”<sup>2</sup> This provision was later amended to clarify that the exemption is for depreciable tangible personal property.<sup>3</sup> The effect of the amendment was to remove all wind generation facilities from the personal property tax rolls.

Sections 12 through 15 of L.B. 1048 simultaneously created a new tax to be imposed on wind generation facilities known as the nameplate capacity tax. Those sections are currently codified at §§ 77-6201 to 77-6204. The nameplate capacity tax is imposed annually on each wind generation facility.<sup>4</sup> The Nebraska Department of Revenue collects the tax and then distributes it to local taxing entities.<sup>5</sup> The Legislature’s intent in adopting the nameplate capacity tax was to “replace property taxes currently imposed on wind infrastructure and depreciated over a short period of time in a way that causes local budgeting challenges and increases upfront costs for wind developers.”<sup>6</sup> The idea was that the amount of tax paid by wind generators would remain the same, but instead of being concentrated into a 5-year period, it would be spread out over a period of 20 or more years.

Section 77-6203(1) provides: “The owner of a wind energy generation facility annually shall pay a nameplate capacity tax equal to the total nameplate capacity of the commissioned wind turbine of the wind energy generation facility multiplied by a tax rate of three thousand five hundred eighteen dollars per megawatt.” “Nameplate capacity” means the “capacity of a wind turbine to generate electricity as measured in megawatts,

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<sup>1</sup> 2010 Neb. Laws, L.B. 1048 (codified at Neb. Rev. Stat. §§ 77-6201 to 77-6204 (Cum. Supp. 2012)).

<sup>2</sup> See Neb. Rev. Stat. § 77-202(9) (Supp. 2011).

<sup>3</sup> 2011 Neb. Laws, L.B. 360; § 77-202(9).

<sup>4</sup> § 77-6203(5)(b).

<sup>5</sup> §§ 77-6203(5)(a) and 77-6204.

<sup>6</sup> § 77-6201(1).

including fractions of a megawatt.”<sup>7</sup> The nameplate capacity tax is imposed “beginning the first calendar year the wind turbine is commissioned.”<sup>8</sup> A wind generation facility commissioned prior to July 15, 2010, is subject to the nameplate capacity tax “on and after January 1, 2010.”<sup>9</sup> Wind generation facilities owned or operated by certain governmental entities, electric membership associations, and cooperatives are not subject to the nameplate capacity tax.<sup>10</sup>

Elkhorn Ridge Wind, LLC (Elkhorn Ridge), located in Knox County, is the only wind energy generation facility in Nebraska that paid personal property taxes prior to the effective date of L.B. 1048. Elkhorn Ridge began commercial operation in December 2008 and was assessed personal property taxes on its wind generation equipment in 2009. Elkhorn Ridge paid all of its assessed 2009 property taxes, in the amount of \$1,594,026. These taxes were distributed to various taxing entities, including Knox County. Without the credit allowed by § 77-6203(5)(b), Elkhorn Ridge would be the only wind energy generation facility required to pay both personal property tax for tax years prior to the effective date of L.B. 1048 and the nameplate capacity tax thereafter.

The Legislature was aware at the time it enacted L.B. 1048 that Elkhorn Ridge had paid personal property taxes on its facility in 2009. In order to ensure that Elkhorn Ridge was similarly situated with all other wind generation facilities in Nebraska and was not double taxed, the Legislature enacted a credit provision, codified at § 77-6203(5)(b), which states:

The amount of property tax on depreciable tangible personal property previously paid on a wind energy generation facility commissioned prior to July 15, 2010, which is greater than the amount that would have been paid pursuant to [the nameplate capacity tax] shall be credited against any tax due under Chapter 77, and any amount

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<sup>7</sup> § 77-6202(2).

<sup>8</sup> § 77-6203(5)(b).

<sup>9</sup> *Id.*

<sup>10</sup> § 77-6203(2)(a).

so credited that is unused in any tax year shall be carried over to subsequent tax years until fully utilized.

For tax year 2010, Elkhorn Ridge reported a nameplate capacity tax of \$284,958. Elkhorn Ridge invoked the credit provision of § 77-6203(5)(b) and was allowed a credit against its 2010 nameplate capacity tax for 2010, and retains a credit balance based on the amount of 2009 personal property taxes it paid.

The district court determined that the credit provision of § 77-6203(5)(b) “constitutes an improper commutation of taxes by effectively reducing the 2009 taxes paid by [Elkhorn Ridge] in Knox County in the form of a post-2009, future credit contrary to NEB. CONST. art. VIII, § 4,” and was therefore unconstitutional and void. The court found it unnecessary to determine whether the credit was special legislation in contravention of article III, § 18. It granted declaratory relief, but denied injunctive relief in the absence of any evidence that the State officials would continue to enforce a law declared to be unconstitutional. The State officials commenced this timely appeal, and the Knox Countians cross-appealed.

## II. ASSIGNMENTS OF ERROR

The State officials assign that the district court erred in (1) finding the credit against the nameplate capacity tax granted by § 77-6203(5)(b) unconstitutionally commuted taxes and (2) failing to find the credit was not special legislation. On cross-appeal, the Knox Countians assign the district court erred in failing to find the credit was special legislation.

## III. STANDARD OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, we are obligated to reach a conclusion independent of the decision reached by the court below.<sup>11</sup> A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.<sup>12</sup>

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<sup>11</sup> *In re Interest of C.R.*, 281 Neb. 75, 793 N.W.2d 330 (2011); *Yant v. City of Grand Island*, 279 Neb. 935, 784 N.W.2d 101 (2010).

<sup>12</sup> *Id.*

## IV. ANALYSIS

### 1. COMMUTATION

Subject to exceptions not applicable here, Neb. Const. art. VIII, § 4, provides:

[T]he Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever.

The State officials argue that this provision applies only to property taxes and that the nameplate capacity tax is not a property tax. The district court rejected this argument. Although it characterized the nameplate capacity tax as an “excise tax,”<sup>13</sup> it noted that in *Kiplinger v. Nebraska Dept. of Nat. Resources*,<sup>13</sup> we considered the merits of an argument that an excise tax violated the constitutional prohibition against commutation of taxes and concluded that it did not. Although acknowledging that the question of whether article VIII, § 4, applied to an excise tax was neither raised nor specifically considered by this court in *Kiplinger*, the district court concluded that it was “not dissuaded from following *Kiplinger* and analyzing the nameplate capacity tax credit against NEB. CONST. art. VIII, § 4.” We now consider the question de novo.

#### (a) Nature of Nameplate Capacity Tax

[3-6] An excise tax is a tax imposed on the manufacture, sale, or use of goods or on an occupation or activity, and is measured by the extent to which a privilege is exercised by the taxpayer, without regard to the nature or value of the taxpayer’s assets.<sup>14</sup> An excise tax is imposed upon the performance of an act.<sup>15</sup> We have also stated that an excise tax includes

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<sup>13</sup> *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011).

<sup>14</sup> *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

<sup>15</sup> *Id.*

taxes sometimes designated by statute or referred to as “privilege taxes,” “license taxes,” “occupation taxes,” and “business taxes.”<sup>16</sup> In contrast, a property tax is levied on real or personal property, with the amount of the tax usually dependent upon the value of the property.<sup>17</sup>

The State officials argue that the nameplate capacity tax is an excise tax because it is measured by the productive activity or capacity of a wind generation facility. But the Knox Countians counter that it is not an excise tax because it is not imposed upon an activity, but instead is imposed upon the capacity to generate electricity, whether the equipment is used or not. The Knox Countians contend that because it does not matter whether the equipment is used, the tax is similar to a tax on personal property. But at the same time, they contend that the nameplate capacity tax “does not replace personal property taxes.”<sup>18</sup>

We addressed a similar issue in *Kiplinger*. There, the tax at issue was designated as an “occupation tax” and was imposed on the “‘activity of irrigation.’”<sup>19</sup> The landowners on whom the tax was imposed argued it was actually a property tax in disguise and as such was improperly imposed for a state purpose. In rejecting this argument, we noted that the tax was not a property tax in part because it was “not dependent upon the value of the land being taxed.”<sup>20</sup>

Similarly, it is clear that the nameplate capacity tax here is not dependent upon the value of the wind turbines and other equipment used to generate electricity. Instead, it is generally imposed on the privilege of owning wind generation facilities in Nebraska and is not measured by the value of those assets. For these reasons, we agree with the district court that it is an excise tax.

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<sup>16</sup> *State v. Galyen*, 221 Neb. 497, 378 N.W.2d 182 (1985).

<sup>17</sup> *Kiplinger*, *supra* note 13.

<sup>18</sup> Brief for appellees at 30.

<sup>19</sup> *Kiplinger*, *supra* note 13, 282 Neb. at 243, 803 N.W.2d at 36, quoting Neb. Rev. Stat. § 2-3226.05 (Cum. Supp. 2008).

<sup>20</sup> *Id.* at 251, 803 N.W.2d at 41.

(b) Applicability of Neb. Const.  
art. VIII, § 4, to Excise Tax

With the exception of *Kiplinger*, all of our cases applying the constitutional prohibition against the commutation of taxes have involved property taxation.<sup>21</sup> In *Kiplinger*, we implicitly assumed that article VIII, § 4, applied to excise taxes, but we did not decide that issue, because it was not raised. We address it now as an issue of first impression.

[7] Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.<sup>22</sup> It is true, as the Knox Countians argue, that the language of article VIII, § 4, does not expressly differentiate between various types of tax. But its prohibition of the release or discharge of a taxpayer's "proportionate share of taxes" and the commutation of "such taxes" raises a legitimate question as to its scope.<sup>23</sup>

[8,9] It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.<sup>24</sup> In ascertaining the intent of a constitutional provision from its language, a court may not supply any supposed omission, or add words to or take words from the provision as framed.<sup>25</sup> The language of article VIII, § 4, does not prohibit the release, discharge, or commutation of "taxes," but, rather, a taxpayer's "proportionate share" of taxes.

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<sup>21</sup> See, *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012); *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996); *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992); *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991); *Peterson v. Hancock*, 155 Neb. 801, 54 N.W.2d 85 (1952); *Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317 (1936); *Woodrough v. Douglas County*, 71 Neb. 354, 98 N.W. 1092 (1904); *State v. Graham*, 17 Neb. 43, 22 N.W. 114 (1885).

<sup>22</sup> *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

<sup>23</sup> Neb. Const. art. VIII, § 4.

<sup>24</sup> *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011); *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

<sup>25</sup> *Tilgner*, *supra* note 24.

That phrase, which we are not free to ignore or disregard, correlates with the requirement of Neb. Const. art. VIII, § 1, that taxes be levied by valuation uniformly and proportionally. We have held that this constitutional provision does not apply to an excise tax.<sup>26</sup>

When article VIII, § 4, was enacted in 1875, property taxes provided the sole means of funding state and local government in Nebraska. In *Woodrough v. Douglas County*,<sup>27</sup> we noted that article VIII, § 4, was taken verbatim from a provision of the Constitution of Illinois which was adopted to address “[a]n evil [which] had grown up in that state which had commenced to break down the principles of uniformity and equality of taxation.” Article VIII, § 4, has been amended twice, in 1958 and 1966, and both amendments related to real property.<sup>28</sup>

[10,11] The Nebraska Constitution, as amended, must be read as a whole.<sup>29</sup> Based on the semantic and historical linkage between the prohibition against commutation of a taxpayer’s “proportionate share” of taxes in article VIII, § 4, and the uniform and proportionate requirements of article VIII, § 1, we conclude that the scope of the two provisions is the same. We therefore hold that the constitutional prohibition against commutation of taxes set forth in article VIII, § 4, does not apply to an excise tax. To the extent that *Kiplinger* can be read to suggest otherwise, it is disapproved.

## 2. SPECIAL LEGISLATION

Because we conclude that the nameplate capacity tax credit does not constitute an unconstitutional commutation of a tax, we must reach the issue not addressed by the district court, which is whether the statute authorizing the credit is special

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<sup>26</sup> *Galyen*, *supra* note 16.

<sup>27</sup> *Woodrough*, *supra* note 21, 71 Neb. at 362, 98 N.W. at 1094.

<sup>28</sup> See, 1957 Neb. Laws, ch. 214, § 1, p. 750; 1965 Neb. Laws, ch. 299, § 1, p. 845.

<sup>29</sup> *State ex rel. Johnson*, *supra* note 22; *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994).

legislation prohibited by the state constitution. Article III, § 18, provides in relevant part:

The Legislature shall not pass local or special laws in any of the following cases, that is to say:

. . . .

Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

[12,13] The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors to a specific class.<sup>30</sup> Generally, a legislative act constitutes special legislation if it either (1) creates an arbitrary and unreasonable method of classification or (2) creates a permanently closed class.<sup>31</sup> A closed class is one that limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development.<sup>32</sup>

[15] The legislation at issue here created a closed class. Section 77-6203(5)(b) limits the availability of the credit to entities which paid personal property taxes on a wind energy generation facility prior to January 1, 2010; Elkhorn Ridge was the only entity that did so. But this does not end the analysis. The Legislature has the power to enact special legislation where the subject or matters sought to be remedied could not be properly remedied by a general law and where the Legislature has a reasonable basis for the enactment of the law.<sup>33</sup>

In *Gossman v. State Employees Retirement System*,<sup>34</sup> we rejected a claim that the State Employees Retirement Act

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<sup>30</sup> *Kiplinger*, *supra* note 13; *Yant*, *supra* note 11.

<sup>31</sup> See *id.*

<sup>32</sup> *Kiplinger*, *supra* note 13.

<sup>33</sup> *Yant*, *supra* note 11; *State, ex rel. Spillman, v. Wallace*, 117 Neb. 588, 221 N.W.2d 712 (1928).

<sup>34</sup> *Gossman v. State Employees Retirement System*, 177 Neb. 326, 129 N.W.2d 97 (1964).

enacted in 1963 was unconstitutional. The act required a monthly contribution from all employees of 1 percent of their salary. The money was used to provide prior service benefits for certain persons employed on the effective date of the act. An employee alleged this was special legislation because the contribution was earmarked for the benefit of a closed class to which he could not belong. We noted that “any retirement act is ‘special’ legislation in the sense that it is designed for a particular group of people and for a special purpose” and that “[i]ts purposes cannot be accomplished by a general law applying to all people.”<sup>35</sup> We further noted that the prior service benefits were a legitimate objective of retirement legislation and concluded that, viewed in the context of the “whole scheme and purpose of the [State Employees Retirement] Act,”<sup>36</sup> the classification was reasonable and did not violate article III, § 18.

In *State, ex rel. Spillman, v. Wallace*,<sup>37</sup> this court upheld the validity of a statute which required state tuberculosis testing of cattle in specified counties, but made such testing optional in other counties. This court reasoned that the Legislature may enact special legislation where it has a reasonable basis to do so.<sup>38</sup>

More recently, in *Yant v. City of Grand Island*,<sup>39</sup> this court held that a law which provided for the relocation of the Nebraska State Fair from Lincoln to Grand Island did not violate the closed class prohibition of article III, § 18, because the Legislature had a reasonable basis for enacting a special law in furtherance of a legitimate public policy. We reasoned that specification of a single site for the state fair was a legitimate legislative function and that a general law was not feasible because relocation of the fair necessarily involved selecting a single location. We also noted that the law did not confer any

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<sup>35</sup> *Id.* at 336, 129 N.W.2d at 104.

<sup>36</sup> *Id.*

<sup>37</sup> *Wallace, supra* note 33.

<sup>38</sup> *Id.*

<sup>39</sup> *Yant, supra* note 11.

special benefit or privilege because the fair was intended to benefit the entire state.

These precedents establish that we must view the nameplate capacity tax credit in the context of the whole scheme and purpose of the broader legislation. The closed class was created by the provision of L.B. 1048 which exempted personal property used for wind energy generation from the personal property tax. When that exemption became effective, Elkhorn Ridge was the only entity which had paid personal property tax on such property, and no other entity could become a member of the class because of the new exemption. The Legislature thus could not enact a general law granting a credit for property tax paid on such property, because only one taxpayer had paid such tax and no others would. Thus, if there were to be a credit, it could apply to only one taxpayer.

The record establishes that the Legislature had a reasonable basis for enacting the credit provision, as it did so in order to address what it correctly perceived as a harsh and unfair consequence of its decision to change the law regarding taxation of property used for wind generation of electricity. The nameplate capacity tax was clearly intended to be instead of, not in addition to, the personal property tax on wind energy generation equipment. But without the credit, Elkhorn Ridge would be required to pay both personal property tax and the nameplate capacity tax on the same equipment. Thus, the credit does not arbitrarily benefit or grant special favors to Elkhorn Ridge, but, rather, achieves tax equity by requiring it to pay only the equivalent of the nameplate capacity tax, in the same manner as all other commercial operators of wind generation facilities.

This court has recognized that the Legislature may legitimately make provision for those adversely affected by a change in the law, although not in the context of a special legislation analysis. We have held that the Legislature may reduce the limitation period for bringing a particular cause of action, but when it does so, it cannot make the new limitation period applicable to existing claims without allowing a reasonable time for parties to bring an action before such claims

are absolutely barred by a new enactment.<sup>40</sup> We examined one such provision in *Macku v. Drackett Products Co.*,<sup>41</sup> which involved a legislative change in the limitation period applicable to product liability actions. The new law provided that, notwithstanding the new limitation period, any person who had a claim on the date of enactment of the new law had 2 years from that date to commence an action.<sup>42</sup> We concluded in *Macku* that this provision complied with the Legislature's obligation to provide a reasonable time for persons to file actions which would otherwise be barred by a new law shortening a limitation period.

The class of existing claims as of the date of enactment of a shortened limitation period is necessarily closed, but the Legislature may nonetheless make special provision for such claims in the new law. This does not arbitrarily benefit or grant special favors to the class, but, rather, prevents its members from being treated unjustly by a change in the law. And, just as the Legislature may make provision for a finite class of existing claims when it enacts a new law shortening a limitations period, it has a reasonable basis in furtherance of a legitimate public policy to grant a credit for personal property tax paid prior to the enactment of the new nameplate capacity tax. We do not read Nebraska's constitutional prohibition against special legislation to proscribe the Legislature from enacting a reasonable provision to prevent an unjust result from a change in the law.

## V. CONCLUSION

For the reasons discussed, we independently conclude that the nameplate capacity tax credit currently codified at

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<sup>40</sup> See, *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994); *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984); *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974), *disapproved on other grounds*, *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998).

<sup>41</sup> *Macku*, *supra* note 40.

<sup>42</sup> See Neb. Rev. Stat. § 25-224(4) (Reissue 2008).

§ 77-6203(5)(b) does not violate either article VIII, § 4, or article III, § 18. Accordingly, we reverse the judgment of the district court and remand the cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCORMACK, J., participating on briefs.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE AND  
CROSS-APPELLANT, V. JOHN BLAKE  
EDWARDS, APPELLANT AND  
CROSS-APPELLEE.  
837 N.W.2d 81

Filed August 2, 2013. No. S-12-777.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Prosecuting Attorneys: Appeal and Error.** A motion for the appointment of a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, a ruling on such a motion will not be disturbed on appeal.
3. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
4. **Jury Instructions.** Jury instructions are not prejudicial if they, when taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence.
5. **Criminal Law: Proof.** The State carries the burden to prove all elements of the crime charged.
6. **Jury Instructions.** An instruction which withdraws from the jury an essential element in the case is prejudicial.
7. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.
8. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
9. **Criminal Law: Entrapment: Estoppel.** The elements of the defense of entrapment by estoppel are (1) that the defendant must have acted in good faith before

taking any action; (2) that an authorized government official, acting with actual or apparent authority and who had been made aware of all relevant historical facts, affirmatively told the defendant that his conduct was legal; (3) that the defendant actually relied on the statements of the government official; and (4) that such reliance was reasonable.

10. **Trial: Evidence: Proof.** The nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense. When the defendant has produced sufficient evidence to raise the defense, the issue is then one which the State must disprove.

Appeal from the District Court for Keith County: JAMES E. DOYLE IV, Judge. Reversed and remanded for a new trial.

Clarence E. Mock, Denise E. Frost, and Matt M. Munderloh, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

As the Keith County Attorney, John Blake Edwards established a pretrial diversion program. After an audit by Nebraska's state auditor and an investigation by the Nebraska State Patrol, Edwards was charged with three counts of theft by unlawful taking for checks written from diversion program funds. Edwards was acquitted by a jury of two of the theft counts and convicted of the third, which was based on a check he wrote on a diversion program account to a local trapshooting team (trap team). He was sentenced to probation. Edwards appeals. We find plain error in the jury instructions, and therefore, we reverse, and remand for a new trial.

## I. FACTS AND PROCEDURAL BACKGROUND

Edwards took office as the Keith County Attorney in January 2007. He established a pretrial diversion program, which allowed for dismissal of criminal charges after the offender completed program requirements, such as community service or alcohol education. Participants paid an enrollment fee and

court costs and entered into a contract with the county attorney's office. The diversion program was initially approved by the Keith County Board of Commissioners on March 7, 2007, with the understanding that the program would be self-funded.

The fees and costs paid by program participants were deposited into a separate bank account in the name of the diversion program, with Edwards as the only authorized signer on the account. Edwards spent \$7,257.11 from the diversion program bank account on supplies for the diversion program between March 7, 2007, and August 13, 2008.

In April 2008, a Keith County commissioner submitted a complaint to the Nebraska Attorney General's office, expressing concern that the diversion program did not have formal approval of the county board and that public funds were being misused. The complaint stated that the program funds were kept in an account available only to Edwards rather than being remitted to the county treasurer. Edwards submitted a response in which he explained that all financial records were kept on the program's computer by his staff and that all deposits and dispersals had been recorded and cross-checked by two employees other than Edwards.

In the spring of 2008, after the commissioner's complaint had been filed, Edwards attended a seminar for county attorneys in Kearney, Nebraska. At the seminar, Edwards had a conversation with John Freudenberg, chief of the criminal division of the Nebraska Attorney General's office. The two men later disagreed as to the substance of the conversation. According to Edwards, Freudenberg motioned for Edwards to come talk to him and then said, "Don't worry about the letter that you've received." Edwards thought Freudenberg was referring to the commissioner's complaint. Edwards testified that Freudenberg told him that he could use the diversion program funds to pay salaries, to supplement employees, or for donations. He further testified that Freudenberg advised him that diversion program funds could be given to employees without being based on the hours they worked.

In contrast, Freudenberg testified that Edwards approached him during a break between sessions of the seminar and that the two discussed the county commissioner's complaint.

Freudenberg told Edwards that if he were a county attorney, he probably would not have a diversion program. Freudenberg denied telling Edwards that he could use diversion funds to pay employees or to make donations. In fact, Freudenberg said they did not discuss the use of diversion program funds, because that was not the nature of the complaint from the county commissioner.

In June 2008, the Attorney General's office informed the county commissioner that it found no basis for involvement by the Attorney General and recommended that the matter be considered by the county board. At its meeting on August 13, 2008, the county board passed a resolution adopting a revised diversion program. An agreement was attached to the resolution. It specifically provided that all program participant fees and costs were to be deposited with the county treasurer. In addition, the county attorney was to maintain a checking account for payment of court costs for diversion participants. Any surplus funds after program costs were paid were to be made available for public projects related to education and prevention of criminal activity, as approved by the board. The board did not give Edwards any direction as to the use of the previous diversion program's checking account.

On January 20, 2009, Edwards wrote a check on the account of the previous diversion program to a local trap team in the amount of \$3,681.09. This check was the basis of the theft charge on which he was convicted. The trap team is a program for junior and senior high trapshooters. Edwards testified that the trap team is a nonprofit organization affiliated with a local sports club which is also a nonprofit organization. However, an investigator for the Nebraska Department of Revenue testified that there was no record with the Secretary of State or the Internal Revenue Service that the trap team was a nonprofit organization. Edwards volunteered with the trap team, assisting with legal work, coaching, and fundraising. He was an authorized signer on the team's checking account. On January 20, a check for \$981.03 drawn on the account of the trap team was written to Edwards and signed by Edwards and his wife. The memorandum line indicated "knives, shells 09 season reimb."

In April or May 2010, the state auditor's office notified Keith County it would conduct an audit of the county, including the county attorney's office. The audit was conducted in July, and a report was issued in September. The audit found that Edwards had been paid \$7,257.11 in excess of the amount the board authorized for his salary. It also found that payments of \$18,989.04 had been made from the previous diversion program without board approval. Edwards explained that he had been unable to locate the receipt folder for the diversion account. He also stated that various payments made to him were not salary but were for reimbursement for items purchased for the office, both for the diversion program and for general office use.

After the auditor's report was released, the Attorney General's office referred the matter to the Nebraska State Patrol for an investigation. Freudenberg was initially assigned to monitor the investigation. But after the State Patrol investigator notified Freudenberg of Edwards' claim that Freudenberg had given Edwards permission to make a donation to the trap team, Freudenberg removed himself from the case because he was a potential witness.

Edwards was charged on September 19, 2011, with three counts of theft by unlawful taking, two counts of income tax evasion, and three counts of filing a false income tax return. After a preliminary hearing, the Keith County Court found that the State had not met its burden of proof on the charges of income tax evasion and filing a false income tax return, and those counts were dismissed. Edwards entered a not guilty plea to the theft charges. The first two were based on checks Edwards wrote on the diversion program account to his wife for her work for the program. They totaled \$2,850. The third theft charge was based on the check written to the trap team.

The jury found Edwards guilty on the third theft charge. He was acquitted of the other two charges. Edwards' motion for a new trial was overruled.

Edwards was sentenced to 36 months of community-based intervention probation, to include intensive supervision probation as set forth in Neb. Rev. Stat. § 29-2262.04 (Reissue

2008). He filed this timely appeal. The State filed a cross-appeal, asserting that the sentence is excessively lenient.

## II. ASSIGNMENTS OF ERROR

Edwards assigns the following errors: The trial court erred in (1) giving an “entrapment by estoppel” instruction that erroneously allocated the burden of proof to Edwards, (2) allowing the trial court clerk to divide the jury panel into two groups for jury selection, (3) failing to disqualify the Attorney General’s office from prosecuting Edwards, (4) refusing to allow testimony from members of the county board regarding use of pretrial diversion funds, (5) refusing to allow Edwards to introduce evidence about the working structures of other diversion programs, (6) admitting evidence of joint income tax returns filed by Edwards and his wife, and (7) failing to give the jury a limiting instruction about the admissible purpose of the income tax returns. Edwards also asserts that his trial counsel provided ineffective assistance of counsel by failing to object to the “entrapment by estoppel” instruction and by failing to follow the specific procedure outlined in Neb. Rev. Stat. § 25-1637 (Reissue 2008) to quash the jury panel.

In a cross-appeal, the State assigns that the trial court abused its discretion in imposing an excessively lenient sentence.

## III. STANDARD OF REVIEW

[1] Whether jury instructions given by a trial court are correct is a question of law.<sup>1</sup> When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.<sup>2</sup>

[2] A motion for the appointment of a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, a ruling on such a motion will not be disturbed on appeal.<sup>3</sup>

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<sup>1</sup> *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013).

<sup>2</sup> *Id.*

<sup>3</sup> *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

## IV. ANALYSIS

### 1. JURY INSTRUCTIONS

Edwards assigns error to the trial court's instruction No. 4, dealing with his affirmative defense of "entrapment by estoppel." Edwards claims the instruction erroneously allocated the burden of proof to him. The instruction listed the elements of the defense and stated: "The defendant must prove all of the elements of the defense by the greater weight of the evidence." It also included the following paragraph:

#### C. Effect of Findings

If you find the defendant proved each of the foregoing elements of the defense by the greater weight of the evidence, then you must find him not guilty of Count III, theft by unlawful taking, and complete the appropriate verdict form. If you find the defendant did not prove each of the foregoing elements of the defense by the greater weight of the evidence, then you must find him guilty of Count III, theft by unlawful taking, and complete the appropriate verdict form.

At oral argument, counsel for the State candidly advised this court that the last sentence of paragraph C quoted above was problematic because it could be understood to remove the burden of proving Edwards' guilt from the State and impermissibly require Edwards to prove his innocence. Counsel suggested that the instruction may constitute plain error.

[3,4] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.<sup>4</sup> Jury instructions are not prejudicial if they, when taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence.<sup>5</sup>

We note that instruction No. 3 correctly instructed the jury on the elements of the offense of theft by unlawful taking as

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<sup>4</sup> *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

<sup>5</sup> See *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

charged in count III of the information. It stated: “The State has the burden of proving beyond a reasonable doubt each one of the foregoing elements necessary for conviction, and this burden never shifts.” Thus, there is no doubt that the jury was correctly instructed that the State had the burden to prove Edwards guilty of the charged offense beyond a reasonable doubt. But the last sentence of instruction No. 4 states a contrary and incorrect proposition that if Edwards did not prove his affirmative defense, the jury was required to find him guilty.

We considered a similarly conflicting jury instruction in *State v. Abram*.<sup>6</sup> In that case, a written jury instruction contained the following sentence: “‘The fact that the Defendant did not testify must be considered by you as an admission of guilt and must not influence your verdict in any way.’”<sup>7</sup> Due to a typographical error, the word “not,” which should have preceded the word “be,” was omitted from the instruction. There was no objection to the instruction. When the court read the instruction aloud to the jury, the court correctly stated that the defendant’s failure to testify “‘must not be considered’” as an admission of guilt.<sup>8</sup> We concluded that the incorrect written instruction constituted plain error requiring reversal.<sup>9</sup> We reasoned that in light of the Sixth Amendment issue at stake, “the risk that the jury at a minimum was confused by the instruction and at worst thought it was required to consider [the defendant] as having admitted guilt prevents us from concluding that the error was harmless.”<sup>10</sup>

[5,6] We reach the same conclusion here. The error in instruction No. 4 implicates both the presumption of innocence and the State’s burden to prove guilt beyond a reasonable doubt. The State carries the burden to prove all elements of the

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<sup>6</sup> *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012).

<sup>7</sup> *Id.* at 60, 815 N.W.2d at 903 (emphasis omitted).

<sup>8</sup> *Id.* at 67-68, 815 N.W.2d at 907 (emphasis omitted).

<sup>9</sup> *State v. Abram*, *supra* note 6.

<sup>10</sup> *Id.* at 70, 815 N.W.2d at 909.

crime charged.<sup>11</sup> An instruction which withdraws from the jury an essential element in the case is prejudicial.<sup>12</sup> When read in conjunction with instruction No. 3, which defined the elements of the crime of theft by unlawful taking which the State had the burden to prove, the jury could easily have been confused as to which elements must be proved and which party had the burden of proof. At worst, the jury could have concluded that if Edwards failed to prove his affirmative defense, it was required to find him guilty. We conclude that the last sentence of instruction No. 4 resulted in plain error which necessitates reversal.

[7] Having found reversible error, we must determine whether the Double Jeopardy Clause bars a second trial. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.<sup>13</sup> We conclude that the totality of the evidence admitted by the trial court was sufficient to sustain Edwards' conviction on count III. Thus, double jeopardy does not preclude a remand for retrial on that count only.

## 2. ISSUES LIKELY TO RECUR

[8] An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.<sup>14</sup> We conclude that the issues raised in this appeal regarding the affirmative defense of entrapment by estoppel and the disqualification of the Attorney General's office are likely to recur on remand, and we therefore address them here.

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<sup>11</sup> *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012).

<sup>12</sup> See, *State v. Merchant*, *supra* note 1; *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

<sup>13</sup> *State v. Merchant*, *supra* note 1; *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012).

<sup>14</sup> *State v. Smith*, *supra* note 12.

(a) Entrapment by Estoppel

This court has not ruled definitively on the availability of the affirmative defense of entrapment by estoppel in criminal cases. In *State v. LeDent*,<sup>15</sup> we noted that our law on this point is “not crystallized” and we found it unnecessary to achieve greater clarity in that case. We do so now.

The defense has been recognized by a number of federal and state jurisdictions.<sup>16</sup> It is rooted in the Due Process Clause of the Fifth Amendment, as interpreted by the U.S. Supreme Court in *Raley v. Ohio*<sup>17</sup> and *Cox v. Louisiana*.<sup>18</sup> In *Raley*, the defendants were convicted of contempt for refusal to testify before a state commission. They had invoked their privilege against self-incrimination as guaranteed by the state constitution after being specifically advised by members of the commission that they had a right to do so. That advisement was incorrect because a state immunity statute deprived them of the protection of the privilege. The Court held that a state court’s affirmance of the convictions violated due process and that permitting the convictions to stand “would be to sanction the most indefensible sort of entrapment by the State—convicting

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<sup>15</sup> *State v. LeDent*, 185 Neb. 380, 383, 176 N.W.2d 21, 23 (1970).

<sup>16</sup> See, e.g., *U.S. v. Hale*, 685 F.3d 522 (5th Cir. 2012); *U.S. v. Bader*, 678 F.3d 858 (10th Cir. 2012); *U.S. v. Theunick*, 651 F.3d 578 (6th Cir. 2011); *U.S. v. Schafer*, 625 F.3d 629 (9th Cir. 2010); *U.S. v. Kieffer*, 621 F.3d 825 (8th Cir. 2010); *U.S. v. Giffen*, 473 F.3d 30 (2d Cir. 2006); *U.S. v. Sousa*, 468 F.3d 42 (1st Cir. 2006); *U.S. v. Marshall*, 332 F.3d 254 (4th Cir. 2003); *U.S. v. Pitt*, 193 F.3d 751 (3d Cir. 1999); *U.S. v. Funches*, 135 F.3d 1405 (11th Cir. 1998); *U.S. v. Howell*, 37 F.3d 1197 (7th Cir. 1994); *U.S. v. Levin*, 973 F.2d 463 (6th Cir. 1992); *U.S. v. Austin*, 915 F.2d 363 (8th Cir. 1990); *People v. Bradley*, 208 Cal. App. 4th 64, 145 Cal. Rptr. 3d 67 (2012); *State v. Barr*, 721 S.E.2d 395 (N.C. App. 2012); *People v. Stephens*, 34 Misc. 3d 43, 937 N.Y.S.2d 822 (2011); *Com. v. Cosentino*, 850 A.2d 58 (Pa. Commw. 2004); *State v. Krzeszowski*, 106 Wash. App. 638, 24 P.3d 485 (2001); *State v. Guzman*, 89 Haw. 27, 968 P.2d 194 (1998); *Miller v. Com.*, 25 Va. App. 727, 492 S.E.2d 482 (1997); *Commonwealth v. Twitchell*, 416 Mass. 114, 617 N.E.2d 609 (1993).

<sup>17</sup> *Raley v. Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959).

<sup>18</sup> *Cox v. Louisiana*, 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

a citizen for exercising a privilege which the State clearly had told him was available to him.”<sup>19</sup>

In *Cox*, the Court reversed the Louisiana Supreme Court’s affirmance of convictions for violation of a state statute which prohibited picketing “‘in or near’” a courthouse.<sup>20</sup> The defendant was part of a group that had been picketing across the street from a courthouse. Police officials had told the defendant he must confine the demonstration to that area. Concluding that these circumstances were similar to those in *Raley*, the Court concluded: “The Due Process Clause does not permit convictions to be obtained under such circumstances.”<sup>21</sup>

[9] Given the constitutional roots of the entrapment by estoppel defense, we conclude that it should be recognized in this state. In this case, paragraph A of instruction No. 4 listed the elements of the defense. The jury was instructed (1) that the defendant must have acted in good faith before taking any action; (2) that an authorized government official, acting with actual or apparent authority and who had been made aware of all relevant historical facts, affirmatively told the defendant that his conduct was legal; (3) that the defendant actually relied on the statements of the government official; and (4) that such reliance was reasonable. Although jurisdictions have formulated the elements of the entrapment by estoppel defense in various ways, we agree that the instruction as given accurately states the essential elements of the defense.<sup>22</sup>

[10] The trial court instructed the jury that “[t]he defendant must prove all of the elements of the defense by the greater weight of the evidence.” Some courts have held that the defendant bears the burden of proving the defense.<sup>23</sup> But, in the absence of a statute placing the burden of proving an

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<sup>19</sup> *Raley v. Ohio*, *supra* note 17, 360 U.S. at 438.

<sup>20</sup> *Cox v. Louisiana*, *supra* note 18, 379 U.S. at 560.

<sup>21</sup> *Id.*, 379 U.S. at 571.

<sup>22</sup> See, e.g., *U.S. v. Bader*, *supra* note 16; *U.S. v. Theunick*, *supra* note 16; *U.S. v. Howell*, *supra* note 16; *U.S. v. Levin*, *supra* note 16; *State v. Guzman*, *supra* note 16; *Miller v. Com.*, *supra* note 16.

<sup>23</sup> See, e.g., *U.S. v. Theunick*, *supra* note 16; *U.S. v. Austin*, *supra* note 16.

affirmative defense on the defendant in a criminal case,<sup>24</sup> we have held that the nature of an affirmative defense is such that the defendant has the initial burden of going forward with evidence of the defense.<sup>25</sup> When the defendant has produced sufficient evidence to raise the defense, the issue is then one which the State must disprove.<sup>26</sup> We conclude that this is the appropriate burden of proof for the entrapment by estoppel defense.

(b) Disqualification of Attorney  
General's Office

Edwards also assigned as error the trial court's failure to disqualify the Nebraska Attorney General's office from prosecuting him. Edwards filed a motion seeking disqualification of the Attorney General's office and appointment of a special prosecutor because there was a possibility that Freudenberg would be called as a witness. The trial court overruled Edwards' motion but disqualified Freudenberg from appearing as an advocate in the case.

A motion for the appointment of a special prosecutor is addressed to the discretion of the trial court, and absent an abuse of discretion, a ruling on such a motion will not be disturbed on appeal.<sup>27</sup> In *State v. Kinkennon*,<sup>28</sup> the defendant sought a special prosecutor after an attorney who worked in the same firm as his defense counsel began working for the county attorney's office. We declined to adopt a per se rule that would require disqualification of an entire prosecuting office based on the mere appearance of impropriety. Instead, we agreed with other courts which had established a procedure whereby the trial court evaluates the circumstances of a particular case and then determines whether disqualification of the entire office is

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<sup>24</sup> See, e.g., Neb. Rev. Stat. §§ 28-202 (Reissue 2008) and 29-2203 (Cum. Supp. 2012).

<sup>25</sup> *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997).

<sup>26</sup> *Id.*

<sup>27</sup> *State v. Kinkennon*, *supra* note 3.

<sup>28</sup> *Id.*

appropriate. Courts take into consideration whether the attorney in question divulged any confidential information to other prosecutors or participated in some way in the prosecution of the defendant. We stated that disqualification is not required if an attorney is “effectively isolated from any participation or discussion of matters” related to the case.<sup>29</sup>

This court recognized in *Kinkennon* that “complete disqualification of a prosecutor’s office may be warranted in cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our judicial system simply could not be maintained otherwise.”<sup>30</sup> However, “when the disqualified attorney is effectively screened from any participation in the prosecution of the defendant, the prosecutor’s office may, in general, proceed with the prosecution.”<sup>31</sup>

In the case at bar, the concern was not whether Freudenberg had shared confidences with the attorneys prosecuting the case, but, rather, whether Freudenberg would serve dual roles as an attorney for the State and as a witness. As noted, the trial court disqualified Freudenberg from involvement in the case as an advocate for the prosecution. Freudenberg was called as a witness only after Edwards had related his version of the conversation between himself and Freudenberg. The record does not support a finding that the trial court abused its discretion in failing to appoint a special prosecutor.

## V. CONCLUSION

For the reasons discussed, we reverse Edwards’ conviction on one count of theft by unlawful taking and remand the cause for a new trial on that count only. Because the conviction must be reversed, the State’s cross-appeal need not be addressed.

REVERSED AND REMANDED FOR A NEW TRIAL.

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<sup>29</sup> *Id.* at 576, 747 N.W.2d at 443.

<sup>30</sup> *Id.* at 578, 747 N.W.2d at 444.

<sup>31</sup> *Id.*

STATE OF NEBRASKA, APPELLEE, V.  
MOHAMED ABDULKADIR, APPELLANT.  
837 N.W.2d 510

Filed August 2, 2013. No. S-12-893.

1. **Appeal and Error.** An appellate court may, at its option, notice plain error.
2. **Appeal and Error: Words and Phrases.** In determining plain error, where the law at the time of trial was settled and clearly contrary to the law at the time of the appeal, it is enough that an error be “plain” at the time of appellate consideration.
3. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
5. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
6. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.
7. **Homicide: Words and Phrases.** A sudden quarrel is a legally recognized and sufficient provocation that causes a reasonable person to lose normal self-control.
8. \_\_\_\_: \_\_\_\_\_. A sudden quarrel does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
9. **Homicide: Intent.** The question when determining whether a killing was upon a sudden quarrel is whether there existed reasonable and adequate provocation to excite one’s passion and obscure and disturb one’s power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.
10. **Homicide: Lesser-Included Offenses.** Although voluntary manslaughter is a lesser degree of homicide, it is not a lesser-included offense of second degree murder under the elements test, because it is possible to commit second degree murder without committing voluntary manslaughter; one who intentionally kills another without premeditation and without the provocation of a sudden quarrel commits second degree murder, but does not simultaneously commit manslaughter.
11. **Homicide: Lesser-Included Offenses: Jury Instructions.** Where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation.
12. **Homicide: Photographs.** Although the probative value of gruesome photographs should be weighed against the possible prejudicial effect before they are

admitted, if the photographs illustrate or make clear some controverted issue in a homicide case, proper foundation having been laid, they may be received, even if gruesome.

13. **Criminal Law: Evidence.** A defendant cannot negate an exhibit's probative value through a tactical decision to stipulate.
14. \_\_\_\_: \_\_\_\_\_. The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.
15. **Criminal Law: Sentences.** There is no statutory requirement that the affirmatively stated minimum term for a Class IB felony sentence be less than the maximum term, and although Neb. Rev. Stat. § 29-2204(1)(a)(ii) (Cum. Supp. 2012) permits a sentencing judge imposing a maximum term of life imprisonment for a Class IB felony to impose a minimum term of years not less than the statutory mandatory minimum, it does not require the judge to do so.
16. **Homicide: Sentences.** A life-to-life sentence for second degree murder is a permissible sentence under Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2012).
17. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

McCORMACK, J.

#### I. NATURE OF CASE

Mohamed Abdulkadir was found guilty of second degree murder and use of a deadly weapon to commit a felony for the death of Michael Grandon. The district court sentenced Abdulkadir to a term of imprisonment of life to life for the second degree murder conviction and to a consecutive term of imprisonment of 15 to 25 years for the use of a deadly weapon conviction. Abdulkadir now appeals and alleges the district court erred in giving incorrect jury instructions, in admitting cumulative and gruesome photographs, and in sentencing him to a term of imprisonment of life to life.

## II. BACKGROUND

Abdulkadir was incarcerated at the Nebraska State Penitentiary on June 30, 2011. On that day, Abdulkadir was working in a prison facility when he was informed by other inmates that his prison cell had been robbed. Abdulkadir immediately left work and returned to his cell.

Abdulkadir returned to find that his television, headphones, compact disc player, various clothing items, prayer oils, and toiletries were missing from his cell. Abdulkadir notified case-worker Cody Eastman that his items had been stolen. Eastman told Abdulkadir to file a report.

Instead of filing the report, Abdulkadir, accompanied by his friends, began asking other inmates if they knew anything about the theft. From his questions, Abdulkadir determined that inmate Grandon was a possible suspect. Abdulkadir approached Grandon in the prison gymnasium and questioned him as to his possible involvement in the theft. Grandon swore “on his hood” that he was not involved. At trial, a prisoner testified that Abdulkadir was nonthreatening toward Grandon during the questioning.

After questioning Grandon, Abdulkadir briefly returned to his cell. At that time, Abdulkadir noticed that Grandon had also returned. Abdulkadir testified that as he was leaving his cell, he was “sucker punche[d]” above his left eye by Grandon. Both men engaged in a struggle, and according to Abdulkadir, Grandon pulled a knife out of his pocket. Abdulkadir was able to gain control of the knife as Grandon placed him in a choke hold. Abdulkadir testified that he then stabbed Grandon multiple times in self-defense.

Corporal Henry McFarland was stationed in the “bubble,” an observation control center down the hall from where Grandon was stabbed. Just before the stabbing, four inmates stood shoulder to shoulder blocking McFarland’s view from the bubble. McFarland had never seen inmates stand like that before and asked them through the intercom system to move. The inmates said they were trimming each other’s hair and slowly dispersed after McFarland commanded them to move.

As the inmates moved away, McFarland heard someone yelling for help. McFarland did not see a knife at that point

and radioed that a fight with no weapons was in progress. McFarland looked down the hallway and saw Grandon fall to the floor. Abdulkadir was standing over Grandon, swinging his arm in a downward motion, and McFarland then saw the knife. McFarland testified that as Abdulkadir was standing over Grandon, McFarland heard Abdulkadir state, “‘You think you can steal from me?’”

Eastman was the first to respond to the fight. When he arrived, he caught a glimpse of the knife and radioed that a weapon was involved and that more personnel would be needed. Abdulkadir was making thrusting motions toward Grandon. Eastman told Abdulkadir that it was over and to drop the weapon. Abdulkadir complied, and Eastman detained him. Medical attention was given to Grandon, but he later died.

After being detained, Abdulkadir was sent to segregation. Corporal Fawn Swisher was in the control room in the segregation unit. She overheard all of the inmates in segregation asking Abdulkadir what he did to be placed in segregation. Swisher turned on the speaker box for Abdulkadir’s cell to gather information. Swisher overheard Abdulkadir telling the other inmates that “somebody was stealing his shit and he couldn’t let that happen and that he’d do it again.”

#### 1. AUTOPSY PHOTOGRAPHS

Dr. Jean Thomsen, a pathologist, performed the autopsy on Grandon. Thomsen testified that in her opinion, the cause of Grandon’s death was the infliction of multiple “cutting and stab wounds to his neck, chest, posterior, abdomen, and buttocks.” During her testimony, the State offered, over the defense counsel’s objections, exhibits 36 through 48, 50, and 51. The exhibits are 15 photographs depicting all 25 stab wounds to Grandon’s body.

Prior to Thomsen’s testimony, the district court held a hearing on the autopsy photographs. Counsel for Abdulkadir offered to stipulate to the content of the photographs. He argued that publishing all 15 photographs would be cumulative and would unnecessarily inflame the jury. The district court asked defense counsel: “I take it [defense counsel] is still requiring the State

to prove a lack of self-defense, is that right?" To which defense counsel answered in the affirmative.

The State argued that the wounds, including the wounds to Grandon's arms and hands, were consistent with defensive wounds. The district court found the exhibits not cumulative and found each exhibit to be relevant on the issue of self-defense.

## 2. JURY INSTRUCTIONS

During the jury instruction conference, Abdulkadir proposed jury instructions for first degree murder, second degree murder, and manslaughter. The district court accepted those instructions with minor changes. Abdulkadir did not object to the final instructions, which were as follows:

### COUNT I:

#### MURDER IN THE FIRST DEGREE

Under Count I of the Indictment in this case, depending on the evidence, you may return one of four possible verdicts. You may find Mohamed Abdulkadir:

1. Guilty of murder in the first degree; or
2. Guilty of murder in the second degree; or
3. Guilty of manslaughter; or
4. Not guilty

### A. ELEMENTS

#### 1. Murder in the first degree.

The elements which the State must prove by evidence beyond a reasonable doubt in order to convict Mr. Abdulkadir of murder in the first degree are:

- (1) That Mr. Abdulkadir killed Michael Grandon;
- (2) That Mr. Abdulkadir did so purposely;
- (3) That Mr. Abdulkadir did so with deliberate and premeditated malice;
- (4) That Mr. Abdulkadir did not do so as the result of a sudden quarrel;
- (5) That Mr. Abdulkadir did not do so in self-defense;
- (6) That Mr. Abdulkadir did so on or about June 30, 2011; and
- (7) That Mr. Abdulkadir did so in Lancaster County.

. . . .

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing elements, and this burden never shifts.

### **2. Murder in the second degree.**

The elements which the State must prove by evidence beyond a reasonable doubt in order to convict Mr. Abdulkadir of murder in the second degree are:

- (1) That Mr. Abdulkadir killed Michael Grandon;
- (2) That Mr. Abdulkadir did so intentionally;
- (3) That Mr. Abdulkadir did not do so as the result of a sudden quarrel;
- (4) That Mr. Abdulkadir did not do so in self-defense;
- (5) That Mr. Abdulkadir did so on or about June 30, 2011; and
- (6) That Mr. Abdulkadir did so in Lancaster County.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing elements, and this burden never shifts.

### **3. Manslaughter.**

The elements which the State must prove by evidence beyond a reasonable doubt in order to convict Mr. Abdulkadir of manslaughter are:

- (1) That Mr. Abdulkadir killed Michael Grandon;
- (2) That Mr. Abdulkadir did so intentionally upon a sudden quarrel;
- (3) That Mr. Abdulkadir did not do so in self-defense;
- . . . . .
- (4) That Mr. Abdulkadir did so on or about June 30, 2011; and
- (5) That Mr. Abdulkadir did so in Lancaster County.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing elements, and this burden never shifts.

## **B. EFFECTS OF FINDINGS**

You must separately consider in the following order the crimes of first degree murder, second degree murder, and manslaughter. For the crime of first degree murder, you must decide whether the State proved each element beyond a reasonable doubt. If the State did so prove

each element, then you must find Mr. Abdulkadir guilty of murder in the first degree and proceed no further on Count I. If you find that the State did not so prove, then you must proceed to consider the crime of second degree murder.

For the crime of second degree murder, you must decide whether the State proved each element beyond a reasonable doubt. If the State did so prove each element, then you must find Mr. Abdulkadir guilty of murder in the second degree and proceed no further on Count I. If you find the State did not so prove, then you must proceed to consider the crime of manslaughter.

For the crime of manslaughter, you must decide whether the State proved each element beyond a reasonable doubt. If the State did so prove each element, then you must find Mr. Abdulkadir guilty of manslaughter. If you find the . . . State did not so prove, then you must find Mr. Abdulkadir not guilty of all charges under Count I.

Although your final verdict must be unanimous, during your preliminary deliberations and discussions, you are not required to be unanimous before considering whether Mr. Abdulkadir is guilty of a lesser offense (i.e., second degree murder or manslaughter.)

The jury found Abdulkadir guilty of second degree murder and use of a deadly weapon to commit a felony. The district court sentenced Abdulkadir to a term of imprisonment of life to life for the second degree murder conviction and to a consecutive term of imprisonment of 15 to 25 years for the use of a deadly weapon conviction. Abdulkadir now appeals.

### III. ASSIGNMENTS OF ERROR

Abdulkadir argues, restated and summarized, that the district court erred by (1) denying a requested instruction that the State prove beyond a reasonable doubt that Abdulkadir did not act in a state of passion upon sudden provocation, (2) using a second degree murder step instruction that did not require the jury to consider the elements of both crimes with the option for convicting Abdulkadir of manslaughter, (3) allowing the admission of cumulative gruesome autopsy photographs, and

(4) sentencing Abdulkadir to “life to life,” because such sentence is a determinate sentence which invades and usurps the province of the Legislature.

#### IV. STANDARD OF REVIEW

[1,2] An appellate court may, at its option, notice plain error.<sup>1</sup> In determining plain error, where the law at the time of trial was settled and clearly contrary to the law at the time of the appeal, it is enough that an error be “plain” at the time of appellate consideration.<sup>2</sup>

[3] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.<sup>3</sup>

[4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.<sup>4</sup>

[5] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.<sup>5</sup>

#### V. ANALYSIS

##### 1. JURY INSTRUCTIONS

[6] On appeal, Abdulkadir argues that the jury instructions were incorrect. However, Abdulkadir did not object at trial to the jury instructions that he now assigns as error. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.<sup>6</sup> Therefore, we will review both of his assignments of error concerning the jury instructions for plain error.

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<sup>1</sup> See *State v. Nadeem*, 284 Neb 513, 822 N.W.2d 372 (2012).

<sup>2</sup> *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

<sup>3</sup> *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

<sup>4</sup> *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

<sup>5</sup> *Id.*

<sup>6</sup> *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

(a) Sudden Quarrel Versus “Heat of  
Passion on Sudden Provocation”

Abdulkadir argues that under *Mullaney v. Wilbur*,<sup>7</sup> the Due Process Clause of the U.S. Constitution requires that the prosecution prove beyond a reasonable doubt the absence of the “‘heat of passion on sudden provocation’” when the issue is properly presented in a homicide case.<sup>8</sup> He argues that the exact language “heat of passion on sudden provocation” is required and the use of only “sudden quarrel” in the jury instructions constituted plain error.<sup>9</sup> We disagree.

In *Mullaney*, the U.S. Supreme Court was addressing a Maine statute that required the defendant to prove that he acted in the heat of passion on sudden provocation, in order to reduce a charge from second degree murder to manslaughter.<sup>10</sup> The Court held that placing the burden of proof with the defendant violated his due process rights.<sup>11</sup>

Contrary to Abdulkadir’s argument, the Court did not rule that states are required to use the language “heat of passion on sudden provocation” when distinguishing between second degree murder and manslaughter. Rather, the Court applied traditional notions of due process to the specific language adopted by the Maine Legislature.

The Nebraska Legislature, like the Maine Legislature, has also prescribed by statute a manslaughter offense. Neb. Rev. Stat. § 28-305 (Reissue 2008) states that “[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.”

[7-9] In *State v. Smith* (*Smith I*),<sup>12</sup> we defined a sudden quarrel as a legally recognized and sufficient provocation

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<sup>7</sup> *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

<sup>8</sup> Brief for appellant at 12.

<sup>9</sup> *Id.* at 14.

<sup>10</sup> *Mullaney v. Wilbur*, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> *State v. Smith*, 282 Neb 720, 806 N.W.2d 383 (2011).

that causes a reasonable person to lose normal self-control. We explained that it does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.<sup>13</sup> The question, we said, is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.<sup>14</sup> We note that the district court included the following proposition of law in the jury instructions: "It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason *so that the elements necessary to constitute murder are absent.*" (Emphasis supplied.) In our recent decision in *State v. Trice*,<sup>15</sup> we held that such an instruction was in error, because malice is not a statutory element of second degree murder in Nebraska. However, as we held in *Trice*, the inclusion of that instruction does not constitute a prejudicial error, but nonetheless it should be avoided.

We find that the district court gave the correct instruction on "sudden quarrel," which is the terminology adopted by the Nebraska Legislature. The U.S. Supreme Court's decision in *Mullaney* does not require the use of "heat of passion on sudden provocation." Furthermore, we find that "sudden quarrel," as defined by our case law, is for all intents and purposes equivalent. Therefore, we do not find that the district court's instruction on "sudden quarrel" resulted in a miscarriage of justice.

#### (b) Step Instruction

Abdulkadir next argues that the step instruction given to the jury did not allow the jury to consider the crime

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<sup>13</sup> *Id.*

<sup>14</sup> See *id.*

<sup>15</sup> *State v. Trice*, ante p. 183, 835 N.W.2d 667 (2013).

of manslaughter while deliberating the elements of second degree murder. Because the second degree murder instruction required the State to disprove beyond a reasonable doubt that Abdulkadir killed Grandon during a sudden quarrel, we disagree.

Our decision is guided by *State v. Smith (Smith II)*,<sup>16</sup> a case we received on petition for further review from the Nebraska Court of Appeals. In *Smith II*, the district court instructed the jury to convict the defendant of second degree murder if the State proved beyond a reasonable doubt that the defendant had killed intentionally, but without premeditation. The court further instructed the jury that only if the State failed to prove one of those elements could the jury go on to consider whether the defendant had committed manslaughter.<sup>17</sup>

[10,11] We held that although voluntary manslaughter is a lesser degree of homicide, it is not a lesser-included offense of second degree murder under the elements test, because it is possible to commit second degree murder without committing voluntary manslaughter; one who intentionally kills another without premeditation and without the provocation of a sudden quarrel commits second degree murder, but does not simultaneously commit manslaughter.<sup>18</sup> Therefore, we held where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation.<sup>19</sup> We found evidence of both elements and affirmed the Court of Appeals' decision to remand the cause for a new trial.<sup>20</sup>

Here, the jury instructions allowed the jury to resolve the fact issue regarding "upon a sudden quarrel" within the

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<sup>16</sup> *State v. Smith*, *supra* note 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

second degree murder instruction. By forcing the jury to decide whether a sudden quarrel existed in the second degree murder instruction, the instruction satisfied the requirements set out in *Smith II*. By convicting Abdulkadir of second degree murder, the jury necessarily found that Abdulkadir did not kill Grandon upon a sudden quarrel. Therefore, the district court did not err with its step instruction.

## 2. AUTOPSY PHOTOGRAPHS

Abdulkadir argues that the admission and publication to the jury of the 15 autopsy photographs were cumulative and were outweighed by their prejudice to Abdulkadir. We disagree and find that each photograph was probative for the jury's determination of whether Abdulkadir was acting in self-defense and whether he killed as a result of a sudden quarrel.

[12-14] We review the district court's decision to admit the autopsy photographs for abuse of discretion. Although the probative value of gruesome photographs should be weighed against the possible prejudicial effect before they are admitted, if the photographs illustrate or make clear some controverted issue in a homicide case, proper foundation having been laid, they may be received, even if gruesome.<sup>21</sup> A defendant cannot negate an exhibit's probative value through a tactical decision to stipulate.<sup>22</sup> The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.<sup>23</sup>

Here, the autopsy photographs of Grandon were admitted to show the extent of the wounds and the manner in which they resulted in his death. According to Thomsen, the wounds were consistent with defensive wounds, indicating that Grandon was trying to defend himself from Abdulkadir. Furthermore, many of the wounds indicated that Abdulkadir was striking downward on Grandon, indicating a superior position in the fight. The photographs were not inordinately gruesome, nor did

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<sup>21</sup> See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds*, *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

<sup>22</sup> *State v. Freemont*, *supra* note 3.

<sup>23</sup> *Id.*

their potential prejudice substantially outweigh their probative value in detailing the nature and cause of Grandon's injuries. Therefore, the district court did not abuse its discretion in allowing the autopsy photographs into evidence.

### 3. LIFE TO LIFE—DETERMINATE SENTENCE

Lastly, Abdulkadir argues that the district court erred in imposing a sentence of "life to life" for second degree murder. He asserts that such sentence is in all practicality a determinate sentence which invades and usurps the province of the Legislature in defining criminal liability and the classification of punishment. We disagree. We have held that life to life is not an illegal punishment, and the Legislature has acquiesced in our reading.

Under Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Cum. Supp. 2012), a court imposing an indeterminate sentence upon an offender shall:

Beginning July 1, 1998:

. . . Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum. If the criminal offense is a Class IV felony, the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term and the maximum limit shall not be greater than the maximum provided by law[.]

[15,16] In *State v. Marrs*,<sup>24</sup> we rejected the argument now advanced by Abdulkadir that life-to-life imprisonment was not an authorized sentence intended by the Legislature. We concluded that there was no statutory requirement that the affirmatively stated minimum term for a Class IB felony sentence be less than the maximum term, and although

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<sup>24</sup> *State v. Marrs*, *supra* note 4.

§ 29-2204(1)(a)(ii) permits a sentencing judge imposing a maximum term of life imprisonment for a Class IB felony to impose a minimum term of years not less than the statutory mandatory minimum, it does not require the judge to do so.<sup>25</sup> We held that a life-to-life sentence for second degree murder was a permissible sentence under § 29-2204.<sup>26</sup> We reaffirmed that decision in *State v. Moore*.<sup>27</sup>

[17] Abdulkadir argues that our reading of § 29-2204 usurps the province of the Legislature. It is true that once the Legislature has defined the crime and the corresponding punishment for a violation of the crime, the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.<sup>28</sup> However, in 2006, we interpreted the Legislature's statute to allow life-to-life sentences for second degree murder, and the Legislature has not altered the sentencing structure for Class IB felonies since our decision in *Marrs*.<sup>29</sup> When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.<sup>30</sup>

We find that the life-to-life sentence is not illegal under the statutes as written and that the Legislature has acquiesced to our interpretation of its statute. Therefore, we find that the district court's sentence did not usurp the legislative authority to define crimes and classify punishment.

## VI. CONCLUSION

For the foregoing reasons, we affirm Abdulkadir's convictions and sentences.

AFFIRMED.

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

<sup>28</sup> *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999).

<sup>29</sup> *State v. Marrs*, *supra* note 4.

<sup>30</sup> *State v. Policky*, 285 Neb. 612, 828 N.W.2d 163 (2013).

SANDRA CARTWRIGHT, APPELLANT, v. STATE OF  
NEBRASKA ET AL., APPELLEES.  
837 N.W.2d 521

Filed August 9, 2013. No. S-12-749.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. \_\_\_\_: \_\_\_\_\_. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
5. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
6. \_\_\_\_\_. If a genuine issue of fact exists, summary judgment may not properly be entered.
7. **Civil Rights.** Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.
8. \_\_\_\_\_. Title VII of the Civil Rights Act of 1964 prohibits both intentional discrimination, known as disparate treatment, as well as practices that, although they are not intentional discrimination, have a disproportionately adverse effect on minorities, which is known as disparate impact.
9. **Employer and Employee: Discrimination.** Disparate impact occurs when an employer uses an employment practice that has a disproportionately adverse effect on protected groups.
10. **Employer and Employee: Discrimination: Proof.** To prove a prima facie case of disparate impact, the plaintiff must show (1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; (2) the existence of a specific, facially neutral employment practice; and (3) a causal nexus between the specific, facially neutral employment practice and the statistical disparity.

11. **Discrimination: Proof.** To recover under the disparate impact theory, plaintiffs must do more than merely prove circumstances raising an inference of a discriminatory impact; they must prove the discriminatory impact at issue.
12. \_\_\_\_: \_\_\_\_\_. To recover under the disparate impact theory, plaintiffs must point to a clearly identifiable practice and prove its impact.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Kathleen M. Neary, of Vincent M. Powers & Associates, for appellant.

Jon Bruning, Attorney General, and Stephanie Caldwell for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LEMAN, and CASSEL, JJ.

McCORMACK, J.

#### NATURE OF CASE

Sandra Cartwright filed suit against the State of Nebraska and Dave Heineman, Gerry Oligmueller, and Randy Palmer, in their individual capacities, in the Lancaster County District Court, alleging racial discrimination and a denial of equal protection under 42 U.S.C. §§ 1981 and 1983 (2006) and title VII of the Civil Rights Act of 1964 (Title VII).<sup>1</sup> The district court granted the motion for summary judgment on all counts in favor of all defendants. Cartwright now appeals.

#### BACKGROUND

Cartwright, who is African-American, was employed by the Nebraska Department of Health and Human Services from 1990 until her retirement in 2009. At all relevant times, Cartwright resided in Omaha, ZIP code 68111.

The State is self-insuring as to state employee health care coverage. Contracts for the administration of health care coverage are awarded every 2 years to one or more successful bidders. In 2006, the State health care coverage plan contracts were open for bids for the 2007 and 2008 benefit years. In

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<sup>1</sup> See title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2006 & Supp. V 2011).

May 2006, the State issued a "Request for Proposal Number 1270Z1," which sought proposals for the administration of the State's group health insurance plans. After receiving and scoring proposals, contracts were awarded to Mutual of Omaha (later purchased by Coventry HealthCare of Nebraska) and Blue Cross Blue Shield of Nebraska.

In 2007 and 2008, the State began using ZIP code coverage areas for the employee health care coverage plans to combat significant increases in health care costs. The State was informed by a contract actuary consultant that the presence of a viable health maintenance organization (HMO) network in the metropolitan ZIP codes, located primarily in the Omaha and Lincoln, Nebraska, metropolitan areas, could allow for a more cost-efficient plan in those areas. The ZIP code approach was a convenient way to define the geographical areas where the provider networks existed. By implementing the ZIP code approach, the State was able to minimize cost increases to both employees and the State.

The two state employee health care coverage plans offered under the Mutual of Omaha contract to the employees who resided in areas with ZIP codes starting with 680, 681, and 685 were an HMO plan and a point-of-service (POS) plan. According to Palmer, the employee benefits administrator for the State at the time, these plans were designed to be the equivalent of the HMO and POS plans offered under the Blue Cross Blue Shield of Nebraska contract to state employees who resided in all of the other ZIP codes of Nebraska. The difference was that the Mutual of Omaha plans were true HMO and POS plans, whereas the Blue Cross Blue Shield plans were not considered to be true HMO and POS plans because they were not administered with a true HMO and POS network, but, rather, a preferred provider organization (PPO) network. This distinction, according to Palmer, allowed the State and its employees to save on premiums in their network.

In the end, four health coverage plan designs were available for each state employee regardless of the ZIP code of the employee's residence. Two plans were administered by Mutual of Omaha in the metropolitan Omaha and Lincoln areas, with ZIP codes starting with 680, 681, and 685. In all other ZIP

code areas, Blue Cross Blue Shield offered all four health care coverage plans. During the open enrollment process for benefit year 2007, all State employees residing in the ZIP codes starting with 680, 681, and 685, including Cartwright, had the option to select one of the following medical plans: Mutual of Omaha POS, Mutual of Omaha HMO, Blue Cross Blue Shield PPO, and Blue Cross Blue Shield "High Deductible" PPO. The PPO plans administered by Blue Cross Blue Shield were available to all employees regardless of where they resided. However, employees who resided in ZIP codes starting with 680, 681, and 685 were excluded from Blue Cross Blue Shield "BlueSelect" HMO plan and the Blue Cross Blue Shield "BlueChoice" POS plan.

During open enrollment for benefit year 2007, Cartwright selected the Blue Cross Blue Shield PPO health insurance plan. For the 2008 benefit year, Cartwright selected the Blue Cross Blue Shield "High Deductible" PPO health insurance plan. For the benefit year 2009 and beyond, the ZIP code method was discontinued.

Cartwright filed the instant lawsuit because she was denied the opportunity to enroll with the health insurance carrier that had insured her prior to 2007 due to the ZIP code exclusion plan. Cartwright alleges that she was discriminated against on the basis of her race because most African-American employees resided in the three excluded ZIP codes and they were offered substandard health insurance based upon the ZIP codes associated with their residential addresses.

In her complaint, Cartwright alleged that approximately 450 African-American citizens are employed by the State and that 96 percent of the 450 African-American employees resided in the ZIP codes starting with 680, 681, and 685. She further alleged that the "health insurance coverage offered through the Mutual of Omaha Insurance was less satisfactory, less comprehensive, provided fewer services, fewer providers, less coverage and less treatment options than the health insurance plan offered in all other zip codes." In her deposition, Cartwright stated that as a result of this discriminatory practice, she suffered an increase in blood pressure, had to increase her insulin and blood pressure medication, suffered headaches, and had to

take time off work due to health-related matters. Cartwright also had to make additional visits to her physician, purchase more prescription medications and diabetes test equipment, and suffered from back spasms as a result of the stress related to the discriminatory practice.

The State and the individual defendants filed a motion for summary judgment on the three causes of action found in the final amended complaint. The first cause of action was based upon 42 U.S.C. § 1981 and alleged that the ZIP code-based health insurance coverage plan discriminated on the basis of race. The second cause of action was under 42 U.S.C. § 1983 and alleged that Cartwright was denied equal protection of the law. The third claim was brought under Title VII, and it alleged that there was a disparate impact upon her as an African-American employee of the State.

The district court granted the motion for summary judgment on all causes of action. Regarding the Title VII disparate impact claim, the district court found that the State and the individual defendants had presented prima facie evidence that neither Cartwright nor any other State employee was truly harmed or adversely impacted by the ZIP code-based health insurance coverage because the evidence is that all of those health insurance coverage plans were designed to be equivalent. The district court further noted that other than Cartwright's own deposition testimony, she provided virtually no evidence that any State employee was harmed or adversely impacted. The district court rejected her testimony and stated that "[c]onclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment."<sup>2</sup> Therefore, the district court concluded that Cartwright did not adduce any credible evidence of adverse impact.

### ASSIGNMENT OF ERROR

Cartwright argues that the district court erred in granting the motion for summary judgment on her claim of disparate impact arising under Title VII, because there were genuine issues of

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<sup>2</sup> See *Recio v. Evers*, 278 Neb. 405, 771 N.W.2d 121 (2009).

material fact and the State and individual defendants were not entitled to judgment as a matter of law. Cartwright does not appeal the district court's granting of summary judgment on the 42 U.S.C. §§ 1981 and 1983 claims.

### STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.<sup>3</sup> In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.<sup>4</sup>

### ANALYSIS

[3-6] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.<sup>5</sup> After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.<sup>6</sup> Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.<sup>7</sup> If a genuine issue of fact exists, summary judgment may not properly be entered.<sup>8</sup>

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<sup>3</sup> *Jeremiah J. v. Dakota D.*, 285 Neb. 211, 826 N.W.2d 242 (2013).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

<sup>8</sup> *Jeremiah J. v. Dakota D.*, *supra* note 3.

[7,8] Cartwright's only remaining cause of action is brought under Title VII, which, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.<sup>9</sup> Title VII prohibits both intentional discrimination, known as disparate treatment, as well as practices that, although they are not intentional discrimination, have a disproportionately adverse effect on minorities, which is known as disparate impact.<sup>10</sup>

[9,10] Disparate impact occurs when an employer uses an employment practice that has a disproportionately adverse effect on protected groups.<sup>11</sup> Thus, to prove a prima facie case of disparate impact, the plaintiff must show (1) the existence of a statistically significant disparity among members of different groups affected by employment decisions; (2) the existence of a specific, facially neutral employment practice; and (3) a causal nexus between the specific, facially neutral employment practice and the statistical disparity.<sup>12</sup>

[11,12] We have held that in order to recover under the disparate impact theory, plaintiffs must do more than merely prove circumstances raising an inference of a discriminatory impact; they must prove the discriminatory impact at issue.<sup>13</sup> That is, they must point to a clearly identifiable practice and prove its impact.<sup>14</sup>

In *Allen v. AT&T Technologies*,<sup>15</sup> we affirmed the district court's dismissal of a disparate impact case under Title VII because the plaintiffs failed to prove how they were negatively

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<sup>9</sup> See *Ricci v. DeStefano*, 557 U.S. 557, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989); *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), cert. denied \_\_\_ U.S. \_\_\_, 132 S. Ct. 1807, 182 L. Ed. 2d 619 (2012), and \_\_\_ U.S. \_\_\_, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (2012); *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000).

<sup>13</sup> See *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988).

<sup>14</sup> See *id.*

<sup>15</sup> *Id.*

impacted.<sup>16</sup> The plaintiffs asserted that the emphasis AT&T Technologies places on education had a disparate impact upon them, because persons 40 years of age and older are less likely to possess post-high-school educations than are younger persons.<sup>17</sup> In the opinion, we noted that the plaintiffs must be able to isolate clearly identifiable employment requirements or criteria which results in a less favorable impact on the protected group.<sup>18</sup> Although education was clearly an identifiable employment requirement, the plaintiffs failed to present evidence from which any fact finder could conclude that but for the lack of a higher education, any plaintiff would have been promoted.<sup>19</sup> We held that such a failure to show a causal connection between the factor at issue and the lack of promotion defeats recovery under the disparate impact theory.<sup>20</sup>

Here, Cartwright properly pleaded that the ZIP code exclusion had an unfavorable impact on those excluded. She alleged that nonexcluded ZIP code employees were “offered a preferable and significantly better health insurance plan.” She alleged that the Mutual of Omaha health insurance she was offered was “less satisfactory, less comprehensive, provided fewer services, fewer providers, less coverage and less treatment options than the health insurance plan offered in all other zip codes.” She further alleged that the offered insurance

failed to provide an in-plan rate coverage to employees’ children who attended college out-of-state, failed to provide a nationwide provider network, failed to provide in-plan rates for specific health issues that required expertise not readily available in Nebraska and other adverse components and/of [sic] coverage and/or costs that are not specifically set forth herein.

She alleged such differences resulted in negative consequences to her health and finances.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

However, in response, the State and the individual defendants filed a motion for summary judgment. In support of their motion, they offered substantial evidence that the Mutual of Omaha plans and the Blue Cross Blue Shield plans were equivalent in terms of coverage and benefits.

The State and the individual defendants offered the affidavit of Palmer. Palmer averred that the contract requirements for Mutual of Omaha and Blue Cross Blue Shield mandated equivalency of coverage in an effort to maintain equality of benefits and to avoid any negative coverage impact for State employees based on their residential ZIP codes. Subsequent to the awarding of the contracts to Mutual of Omaha and Blue Cross Blue Shield, Palmer convened meetings with representatives of each contractor and members of his staff. At these meetings, the HMO and POS coverage plans offered by each contractor were reviewed, point by point, to ensure to the greatest extent possible that these plans would be equivalent, regardless of which contractor administered the respective health coverage plans and regardless of the residential ZIP codes of the employees. Palmer avers in his affidavit that no potential discriminatory impact for any particular group of State employees was ever identified as a part of the contract award process or in the design of the health plans.

Additionally, the State and the individual defendants offered the affidavit of Paula Fankhauser, the employee benefits administrator for the State. According to Fankhauser, the Mutual of Omaha HMO and the Blue Cross Blue Shield "BlueSelect" HMO plans had identical benefit designs. Likewise, the Mutual of Omaha POS and the Blue Cross Blue Shield "BlueChoice" POS plans had identical benefits. In support of her testimony, Fankhauser prepared a spread sheet comparing State employee health plan options for 2007 and 2008.

The spread sheet compares the "BlueChoice" plan not offered in ZIP codes starting with 680, 681, and 685 with the Mutual of Omaha POS, which was available in those ZIP codes. For the in-network plans, both offer identical coverage and benefits. Neither plan requires a deductible, and both set an out-of-pocket maximum at \$1,500 for individuals and \$3,000 for the family. Both plans have identical copay and

coinsurance benefits for every medical service provided. This includes: office visits; annual examinations; annual eye examinations; surgery, radiology, laboratory, and chemotherapy; inpatient hospitalization; outpatient surgery; outpatient surgical center; “Well baby” examinations; mammograms; Pap smears; maternity services; allergy testing and shots; child immunizations (through age 6); ambulance; urgent care center; hospital emergency room; skilled nursing facility; durable medical equipment; rehabilitation services (physical therapy, chiropractic services, occupational therapy, and speech therapy); home health care and hospice; inpatient mental illness and substance abuse treatment; outpatient mental illness and substance abuse treatment; serious inpatient mental illness; and serious outpatient mental illness.

The same holds true when comparing the “BlueChoice” out-of-network plan and the Mutual of Omaha POS out-of-network plan. Each of the above categories is identical for the out-of-network plans. Likewise, the “BlueSelect” plan, not available in ZIP codes starting with 680, 681, and 685, is identical to the Mutual of Omaha HMO. The only difference on the spread sheet is the premiums paid. However, across the board, the premiums paid in ZIP codes starting with 680, 681, and 685 were cheaper than the Blue Cross Blue Shield counterparts.

Presented with this evidence, the district court concluded that the burden shifted to Cartwright to show the existence of a material issue of fact. We agree. The evidence presented by the State and the individual defendants established that the plans offered in the excluded ZIP codes were equivalent to the plans offered statewide. This entitled the State and the individual defendants to judgment as a matter of law. However, before the district court could enter judgment, the burden shifted to Cartwright to produce evidence showing the existence of a material issue of fact that would prevent judgment.<sup>21</sup>

In response, Cartwright produced as evidence her deposition testimony and relied on deposition statements made by

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<sup>21</sup> See *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

Palmer and Mike McCrory, who was the director of personnel for the State. Cartwright alleges in her deposition that the plans offered to her were less comprehensive, provided smaller networks, did not cover medical care for dependents received out-of-network, offered fewer and inferior specialists, and covered less of her medical expenses. Cartwright attempts to use the deposition testimony of Palmer and McCrory to support her conclusion.

We first note, as an overview, that Cartwright offered very little evidence demonstrating the inferiority of the plans available to her. Her own deposition testimony is largely conclusory, based on her own opinions and speculation.

Second, in her deposition and brief, Cartwright repeatedly makes the mistake of comparing the wrong insurance plans. For instance, Cartwright states in her brief that “[t]he Mutual of Omaha and Coventry plans offered to . . . Cartwright in 2007 and 2008 did not have the comprehensive in and out of network providers and paid fewer benefits than the *plan previously held* by Cartwright.”<sup>22</sup> Such a comparison is irrelevant. Only the plans offered in 2007 and 2008 are relevant to the determination of whether the excluded ZIP codes received inferior plans. Further, she often compares the wrong Blue Cross Blue Shield plan with the wrong Mutual of Omaha plan. Doing so creates an incorrect impression that the plans she was offered were inferior. For purposes of this summary judgment, the appropriate comparison is to contrast “BlueChoice” with Mutual of Omaha POS and “BlueSelect” with Mutual of Omaha HMO.

With this in mind, we will now address Cartwright’s evidence that the plans she was offered were inferior. In her deposition, Cartwright repeatedly testified that the insurance coverage offered by Mutual of Omaha was inferior to the plans offered statewide. Her testimony was that the plans offered were less comprehensive and had inferior access to specialists. But, in her deposition and in her brief, Cartwright failed to give evidence establishing such allegations as true. There was no reference to the insurance plans or use of expert

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<sup>22</sup> Brief for appellant at 15 (emphasis supplied).

testimony. The only probative evidence presented on this issue, which includes the testimony of Palmer and Fankhauser, established that the benefits were designed to be, and were in fact, equivalent. Cartwright never directly challenged this evidence. Therefore, in light of the State's evidence, Cartwright's testimony amounts to nothing more than speculation, which is insufficient to create a genuine issue of material fact.

In addition, Cartwright attempted to use the deposition testimony of Palmer and McCrory to establish that the Mutual of Omaha plans did not cover medical care for dependents received out of network. In her brief, Cartwright stated that "McCrory admitted that the Mutual HMO lacked provider networks in greater Nebraska."<sup>23</sup> Cartwright also stated that Palmer "admitted that the HMOs offered in Zip Codes 680, 681 and 685 in 2007-2008 did not provide out of service or out of network benefits to their insureds."<sup>24</sup> Although these statements in a vacuum are true, Cartwright fails to take into account that the equivalent "BlueSelect" plan offered by Blue Cross Blue Shield was also limited to "In-Network" only and that both plans did not have out-of-network coverage. In her brief, she also states that the Mutual of Omaha POS plan does not provide out-of-network benefits. This is wrong; the Mutual of Omaha POS plan specifically provided for out-of-network coverage. This out-of-network coverage was identical, according to Palmer and Fankhauser, as the coverage provided by "BlueChoice."

Cartwright failed to provide evidence, other than conclusions from her own testimony, on why "BlueSelect's" in-network plan was superior to Mutual of Omaha's in-network HMO plan or on why "BlueChoice's" out-of-network coverage was preferable to Mutual of Omaha's POS coverage. In fact, the only evidence in the record is from Palmer and Fankhauser, which established that the benefits and coverage are the same. Cartwright has failed to meet her burden, after it had shifted to her, of establishing a material issue of fact on whether the plans she was offered were inferior.

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<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.*

Cartwright has also failed to establish that the alleged inferiorities of the plans she was offered resulted in any adverse impact to her. Cartwright alleged that her post-2006 health insurance did not cover her mammogram or Pap smear, did not allow access to some specialists, did not cover her insulin prescriptions, and classified the doctor treating her back condition as an “out-of-network provider.” Cartwright’s allegations fail because she never provided evidence that the plans she was excluded from would have provided these services. Rather, she repeatedly referenced that these were covered under her previous Blue Cross Blue Shield policy, which is irrelevant. Her failure to provide evidence that the plans she was excluded from would have covered the above-mentioned medical services is fatal to her claim. Cartwright failed to establish, with evidence, any adverse impact to being excluded.

In sum, we find that the State and the individual defendants presented sufficient evidence to shift the burden to Cartwright. After it shifted, Cartwright failed to meet her burden to show the existence of a material issue of fact on the issues of whether the plans offered in ZIP codes starting with 680, 681, and 685 were inferior and whether the alleged inferiorities resulted in an adverse impact. The evidence provided in the record, even when viewed in the light most favorable to Cartwright, established that the State and the individual defendants were entitled to judgment as a matter of law under a Title VII disparate impact claim.

### CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

MARIE SHADA, APPELLANT, v. FARMERS  
INSURANCE EXCHANGE AND ABC  
COMPANY, APPELLEES.  
840 N.W.2d 856

Filed August 9, 2013. No. S-12-1155.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. \_\_\_\_: \_\_\_\_\_. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
4. **Actions: Insurance: Motor Vehicles: Breach of Contract.** An insured's cause of action on an insurance policy to recover underinsured motorist benefits accrues at the time of the insurer's breach or failure to do that which is required under the terms of the policy.
5. **Insurance: Motor Vehicles: Contracts: Tort-feasors.** Underinsured motorist coverage is a contract which indemnifies an insured when a tort-feasor's insurance coverage is inadequate.
6. **Limitations of Actions: Insurance: Motor Vehicles: Contracts.** Neb. Rev. Stat. § 25-205 (Reissue 2008), which provides for a 5-year statute of limitations on written contracts, applies in an insured's suit against its underinsured motorist coverage insurer when the insured has timely filed the underlying claim against the underinsured motorist.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Reversed and remanded for further proceedings.

Martin A. Cannon, of Cannon Law Office, for appellant.

Daniel P. Chesire and Cathy S. Trent-Vilim, of Lamson, Dugan, & Murray, L.L.P., and, on brief, Kara S. Jermain, for appellee Farmers Insurance Exchange.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LEMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

### NATURE OF CASE

On January 4, 2011, Marie Shada filed this action in the district court for Douglas County based on contract against Farmers Insurance Exchange (Farmers) and another entity, the latter of which is not relevant to this appeal, alleging that Farmers failed to pay “sums available” for underinsured motorist coverage under her insurance policy with Farmers. Shada admitted that she never made a formal demand on Farmers prior to filing suit. As affirmative defenses in its answer, Farmers alleged that Shada’s action is barred by the statute of limitations or by laches. Farmers then filed a motion for summary judgment.

The district court concluded that the limitations period commenced when Shada settled with the underinsured driver in December 2001 and that Shada’s claim was barred by the 5-year contract statute of limitations. Neb. Rev. Stat. § 25-205(1) (Reissue 2008). The district court entered an order granting Farmers’ motion for summary judgment on this basis. Shada appeals. Because we conclude that the district court erred as a matter of law in its selection of the commencement for limitations purposes, we reverse, and remand for further proceedings.

### STATEMENT OF FACTS

On November 6, 1996, Shada was injured in an automobile accident with another driver, Timothy Hinze, who was insured by American Family Insurance. The accident was caused by the negligence of Hinze. At the time of the accident, Shada had an automobile insurance policy with Farmers, which included uninsured and underinsured motorist coverage. With Farmers’ knowledge and consent, on December 28, 2001, Shada received a settlement from Hinze’s insurer.

Shada filed this action based on contract on January 4, 2011. In her complaint, she alleged that her damages from the 1996 accident exceeded the coverage available from Hinze’s insurer and that Farmers had failed to pay “sums available” for her benefit pursuant to her underinsured motorist coverage.

Shada did not specify the manner in which Farmers allegedly breached the contract of insurance. Shada sought damages of \$250,000 plus attorney fees and costs.

Farmers moved for summary judgment. A hearing was held on the motion. At the hearing, Farmers submitted and the court received four exhibits, including: Shada's deposition, to which her responses to requests for admission were attached; the affidavit of Farmers' branch claims manager; the affidavit of a claims representative for Farmers; and the affidavit of the attorney for Farmers. Shada admitted in her deposition that she never made a formal demand on Farmers for underinsured motorist coverage. Shada submitted and the court received three exhibits, including: the affidavit of Shada, which set forth a copy of her policy with Farmers; another affidavit of Shada, which set forth her medical bills and records; and the affidavit of Shada's attorney.

The record from the hearing shows that on December 28, 2001, with the consent of Farmers, Shada received a settlement of policy limits with Hinze's insurer. Shada's attorney stated in his affidavit that following Shada's settlement with Hinze's insurer, he had had "informal chats" with Farmers' attorney and Farmers' adjustor regarding Shada's upcoming claim for underinsured motorist coverage and that he was "never told that the claim would be dishonored as untimely or given a deadline for submitting one."

The record further shows that on November 24, 2010, Shada's attorney sent a letter to Farmers indicating that he was preparing a demand on Farmers on Shada's behalf for underinsured motorist coverage. In his affidavit, Shada's attorney stated that he was advised that Farmers viewed such upcoming claim for underinsured motorist coverage as untimely and that such claim would not be paid. Shada's attorney further stated in his affidavit that "[e]ven absent a formal demand, I viewed this as a denial of the claim and filed suit [on January 4, 2011]."

The district court originally overruled Farmers' motion for summary judgment. Farmers moved for reconsideration, and the district court granted the motion. The order granting

Farmers' motion for summary judgment upon reconsideration is before us on appeal.

In *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 629, 611 N.W.2d 409, 416 (2000), we recognized the contract-based nature of an underinsured coverage dispute and held that "an insured's cause of action on an insurance policy to recover underinsured motorist benefits accrues at the time of the insurer's breach or failure to do that which is required under the terms of the policy." The parties and the district court acknowledged *Snyder* in the summary judgment proceedings.

In the court's ruling in this case, it noted that the parties agreed the claim was subject to the 5-year limitations period for contracts under § 25-205(1) but that they disagreed on the date the statute began to run. Shada asserted that the breach occurred when, shortly after she advised Farmers on November 24, 2010, that she would be filing an underinsured motorist claim, Farmers told her that a claim would be considered untimely and would not be paid. Farmers responded that the present case differed from *Snyder*, wherein the insured made her claim for underinsured motorist benefits within a month after settling with the tort-feasor; in the present case, Shada waited almost 10 years and still had not made a claim. Farmers contended that when a demand has not been timely made, the statute of limitations should begin to run on the date of the settlement of the underlying tort case. Farmers cited cases from other jurisdictions in support of its argument. See, *Yocherer v. Farmers Ins. Exchange*, 252 Wis. 2d 114, 643 N.W.2d 457 (2002); *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000); *Brown v. American Family Ins. Group*, 989 P.2d 196 (Colo. App. 1999).

In the district court's order granting summary judgment in favor of Farmers, it stated that "[a]fter extensive reconsideration," it determined that in *Snyder*, the Nebraska Supreme Court "did not consider the ramifications on the statute of limitations when an insured indefinitely postpones making a demand on the insurer for such benefits." The district court thereafter stated that the contract-based approach adopted in *Snyder* "vests too much control in one party to determine the timetable

for his or her claim, to the other party's detriment." After discussing *stare decisis* and the circumstances under which it may be abandoned, the district court stated it was "reluctant to abandon the contract-based approach for the statute of limitations for [underinsured motorist] claims as set forth in *Snyder*." But, in a departure from *Snyder*, the district court nevertheless concluded that the law ought to be as follows:

The date commencing the statute of limitations in actions for underinsured motorist coverage should be on the first of the following dates: (1) the date [on] which there has been a final resolution of the underlying claim with the tortfeasor, be it through denial of the claim, settlement, judgment, or some other resolution; or (2) the date the [underinsured motorist] insurer denies an insured's demand for [underinsured motorist] benefits, whichever is earlier.

Applying its new rule, the court concluded that the statute of limitations on Shada's claim against Farmers ran in 2006, 5 years after Shada settled with Hinze's insurer, and that therefore, her action filed on January 4, 2011, was time barred. The court granted summary judgment in Farmers' favor and dismissed Shada's complaint.

Shada appeals. We granted Farmers' petition to bypass.

### ASSIGNMENT OF ERROR

Shada claims that the district court erred when it found that her case was time barred by the 5-year contract statute of limitations.

### STANDARDS OF REVIEW

[1] An appellate court independently reviews questions of law decided by a lower court. *Beveridge v. Savage*, 285 Neb. 991, 830 N.W.2d 482 (2013).

[2,3] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Id.* In reviewing a summary judgment, an appellate

court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013).

### ANALYSIS

Shada claims generally that the district court erred when it granted Farmers' motion for summary judgment based on its determination that Shada's claim was time barred by the 5-year contract statute of limitations. Shada specifically claims that the district court erred as a matter of law when it adopted a new rule and deviated from *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000). We agree with Shada that the district court erred as a matter of law when it departed from *Snyder* and further conclude that, given the undisputed facts and applying the controlling law to the action as pled, Shada's claim is not time barred under the 5-year contract statute of limitations. Therefore, we reverse the judgment of the district court and remand the cause for further proceedings.

[4] This case is controlled by *Snyder*. As noted above, in *Snyder*, we held that "an insured's cause of action on an insurance policy to recover underinsured motorist benefits accrues at the time of the insurer's breach or failure to do that which is required under the terms of the policy." 259 Neb. at 629, 611 N.W.2d at 416. In *Snyder*, we recognized that courts follow various approaches to determine when an insured's cause of action for underinsured motorist benefits accrues. We analyzed the jurisprudence in this area and joined the majority of courts that have held that "because the action sounds in contract, the claim accrues and the statute of limitations begins to run on the earliest date the contract is breached." *Id.* at 627, 611 N.W.2d at 415 (citing cases holding majority rule). In the instant case, the district court found *Snyder* wanting and applied the minority view which we had previously rejected. Upon revisiting the issue, we believe our holding in *Snyder* remains sound and we continue to adhere to our view expressed therein.

[5] We have repeatedly observed that underinsured motorist coverage is a contract which indemnifies an insured when a tort-feasor's insurance coverage is inadequate. *Dworak v. Farmers Ins. Exch.*, 269 Neb. 386, 693 N.W.2d 522 (2005); *Snyder v. EMCASCO Ins. Co.*, *supra*. See, also, *Schrader v. Farmers Mut. Ins. Co.*, 259 Neb. 87, 608 N.W.2d 194 (2000). Most relevant to our analysis are our opinions in *Schrader* and *Snyder*.

[6] In *Schrader*, we quoted the rationale of the Supreme Court of Rhode Island, which provided:

“Although a tortious injury is an incidental element in the insured's suit against his insurer over a policy contract, the action is fundamentally one in contract. The [insured] here would have no action if it were not for the coverage provided by her insurance policy. The insurer's liability [a]rises solely from the insurance contract and nothing else.”

259 Neb. at 94, 608 N.W.2d at 199 (quoting *Pickering v. American Empl. Ins. Co.*, 109 R.I. 143, 282 A.2d 584 (1971)). We recognized in *Schrader* that because underinsured motorist coverage is generally governed by contract, a vast majority of jurisdictions conclude that the contract statutes of limitations apply where there is no specific statute addressing the time period within which this type of action must be brought against the underinsured motorist coverage insurer. See, also, 3 Alan I. Widiss & Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Insurance* § 34.3 (rev. 3d ed. 2005 & Cum. Supp. 2012). Accordingly, in *Schrader*, we held that § 25-205, which provides for a 5-year statute of limitations on written contracts, applies in an insured's suit against its underinsured motorist coverage insurer when the insured has timely filed the underlying claim against the underinsured motorist.

As explained in *Schrader*, jurisdictions have adopted a variety of approaches as to when the underinsured cause of action accrues. See *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000). These theories generally isolate three different events as triggering the statute of limitations and the accrual of the cause of action: the date of the accident;

the date the underlying tort claim is resolved; and the date the contract is allegedly breached, such as when the insurer rejects the insured's claim for benefits. *Id.* See, also, *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775 (Iowa 2000) (describing three theories of when cause of action accrues and statute of limitations begins to run); 3 Widiss & Thomas, *supra*, § 34.4. In *Schrader*, it was not necessary for us to decide which theory of accrual to adopt.

In *Snyder*, we were faced squarely with the accrual issue and joined the majority of states which have determined that the action accrues at the time of the insurer's breach. In explaining the rationale for this rule, we quoted the reasoning of the Supreme Judicial Court of Massachusetts, which stated that "[p]rior to the time when the contract is violated there is no justiciable controversy, and it would be illogical to let the statute of limitations for bringing an action begin to run before the action can be brought." *Snyder v. EMCASCO Ins. Co.*, 259 Neb. at 627, 611 N.W.2d at 415 (quoting *Berkshire Mutual Insurance Co. v. Burbank*, 422 Mass. 659, 664 N.E.2d 1188 (1996)).

Customarily, an insurance policy for underinsured motorist benefits will include an "exhaustion clause," which requires the insured to exhaust payments from the underinsured motorist tort-feasor before the insurer will pay the insured according to the policy. In the present case, Shada's insurance policy for underinsured motorist benefits with Farmers included such an "exhaustion clause," and it is not disputed that Shada brought an underlying tort claim against Hinze, the underinsured motorist tort-feasor, and settled that claim with Farmers' consent. The present case stems from Shada's allegation that the settlement amount is insufficient and that she is therefore entitled to underinsured coverage under her contract with Farmers.

Shada has sued Farmers for a breach of contract, but she has not alleged a breach or a specified failure of Farmers to perform under the contract of insurance. In *Snyder*, we stated that accrual commences upon a breach and we observed that this proposition is "sound and consistent with our well-established rule that an action on a written contract accrues

at the time of breach or failure to perform.” 259 Neb. at 628-29, 611 N.W.2d at 416. As the Nevada Supreme Court stated, it would not make sense “to begin the statute of limitations before the insured even has a justiciable claim for breach of contract.” *Grayson v. State Farm Mut. Auto. Ins.*, 114 Nev. 1379, 1381, 971 P.2d 798, 799 (1998). Since our decision in *Snyder*, there has continued to be a split of authority as to when accrual begins; however, the majority of jurisdictions still hold that the cause of action for underinsured motorist benefits accrues and the statute of limitations begins to run on the date the insurance contract is breached. See, e.g., *Brooks v. State Farm Insurance Co.*, 141 N.M. 322, 154 P.3d 697 (N.M. App. 2007); *Shelter Mut. Ins. Co. v. Nash*, 357 Ark. 581, 184 S.W.3d 425 (2004) (collecting cases).

Given the contractual nature of underinsured motorist claims, our case law, and the jurisprudence in a majority of other jurisdictions, we believe *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000), was soundly decided and we continue to follow our holding in *Snyder*. The district court failed to follow *Snyder* and adopted a minority view, which we previously considered and rejected. Upon reevaluation, we continue to adhere to our previously adopted view that the action accrues upon the insurer’s breach and accordingly conclude that the district court erred as a matter of law when it failed to follow this precedent. We reverse the order of the district court which granted summary judgment in favor of Farmers and remand the cause for further proceedings.

We note that in its answer, Farmers raised as affirmative defenses both the statute of limitations and laches. In its decision, the district court ruled only on the statute of limitations defense and did not comment on the issue of laches. Because the district court did not address the issue of laches and because Farmers did not raise the district court’s failure to consider laches in a cross-appeal, we do not address the issue here.

## CONCLUSION

The district court failed to apply our holding in *Snyder* that the action accrues upon the insurer’s breach and erred as a

matter of law when it determined that Shada's action against Farmers for underinsured motorist benefits accrued upon her settlement with the tort-feasor's insurer and was time barred. Therefore, we conclude that the district court erred when it granted Farmers' motion for summary judgment and dismissed the case. We reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR  
FURTHER PROCEEDINGS.

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EDDIE HECKMAN, APPELLEE, v. BURLINGTON  
NORTHERN SANTA FE RAILWAY  
COMPANY, APPELLANT.  
837 N.W.2d 532

Filed August 16, 2013. No. S-12-335.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Juries: Verdicts.** A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant.
3. **Juries: Verdicts: Presumptions.** Because a general verdict does not specify the basis for an award, Nebraska law presumes that the winning party prevailed on all issues presented to the jury.
4. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretative decisions of the federal courts construing the act.
5. **Federal Acts: Railroads: Pensions: Words and Phrases.** For purposes of the Railroad Retirement Act, the definition of compensation includes payments for time lost.
6. **Employer and Employee: Wages.** An employee is deemed to be paid "for time lost" the amount he is paid by an employer for an identifiable period of absence, including absence on account of personal injury.
7. **Federal Acts: Railroads: Pensions: Presumptions: Damages.** The Railroad Retirement Act presumes that payments for personal injury are compensation for time lost unless they are specifically apportioned otherwise.
8. **Federal Acts: Railroads: Pensions.** The Railroad Retirement Board treats the total Federal Employers' Liability Act award as pay for time lost if the payment for personal injury is based in part on pay for time lost.

9. **Employer and Employee: Contracts: Wages.** Employers and employees can negotiate settlement agreements and allocate portions of a settlement award to lost wages and other compensatory categories.

Appeal from the District Court for Box Butte County: TRAVIS P. O’GORMAN, Judge. Reversed and remanded with directions.

Nichole S. Bogen and Thomas C. Sattler, of Sattler & Bogen, L.L.P., for appellant.

Andrew W. Snyder and Maren L. Chaloupka, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., for appellee.

Kathryn Keneally, Assistant Attorney General, Deborah R. Gilg, U.S. Attorney, Robert L. Homan, Assistant U.S. Attorney, and Jonathan S. Cohen and Marion E.M. Erickson, of U.S. Department of Justice, Tax Division, Appellate Section, for amicus curiae United States of America.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LEMAN, and CASSEL, JJ.

WRIGHT, J.

### I. NATURE OF CASE

Pursuant to the Federal Employers’ Liability Act (FELA), Eddie Heckman was awarded \$145,000 in damages for on-the-job injuries sustained while working for Burlington Northern Santa Fe Railway Company (BNSF). BNSF paid the judgment, but withheld \$6,202.70 as Heckman’s share of Railroad Retirement Tax Act (RRTA) payroll taxes on the entire general verdict award. The district court overruled BNSF’s “Motion for Satisfaction and Discharge of Judgment” and ordered BNSF to pay the \$6,202.70 directly to Heckman. It also required the parties to agree in writing that no amount of the award would be considered lost wages, so as to avoid any obligations under the RRTA.

BNSF appealed, claiming that the court’s order conflicted with federal tax and railroad laws. We granted BNSF’s petition to bypass the Nebraska Court of Appeals. The issue is whether the general verdict award in favor of Heckman is an award of compensation from which BNSF is required to withhold

a portion of the award in order to pay RRTA payroll taxes. For the reasons set forth herein, we reverse the judgment and remand the cause with directions.

## II. SCOPE OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013).

## III. FACTS

Heckman was injured in the course and scope of his employment with BNSF. Because he was a railroad employee, he filed a claim for personal injury damages pursuant to FELA, 45 U.S.C. § 51 et seq. (2006). Heckman's pleadings included claims for lost earnings and benefits. He testified at trial regarding his lost wages and argued lost wages as part of his request for damages. The court instructed the jury to consider awarding Heckman damages to compensate for his injury, including lost wages, if it returned a verdict in his favor. Neither party requested a special verdict instruction. The court instructed the jury as follows:

I am about to give you a list of the things you may consider in making this decision. From this list, you must only consider those things you decide were in whole or in part caused by [BNSF's] negligence:

1. The nature and extent of the injury, including whether the injury is temporary or permanent and whether any resulting disability is partial or total;

2. The reasonable value of the medical, hospital, nursing, and similar care and supplies reasonably certain to be needed and provided in the future;

3. The physical pain and mental suffering [Heckman] has experienced and is reasonably certain to experience in the future;

4. The wages [Heckman] has lost because of his inability or diminished ability to work.

The jury returned a general verdict in favor of Heckman and awarded him \$290,000 less 50 percent for his contributory negligence. The jury did not specify how it attributed damages.

The district court approved the verdict and entered judgment in favor of Heckman for \$145,000.

On October 19, 2011, BNSF deposited \$127,256.70 with the clerk of the district court for Box Butte County, Nebraska, and filed its motion for satisfaction and discharge of judgment. The amount deposited consisted of the judgment amount of \$145,000 plus 45 days of accrued postjudgment interest and \$1,974.24 in costs. Withheld from that amount was \$20,089.53, which was calculated as follows:

(1) \$7,868.53 to satisfy the Railroad Retirement Board's lien for [Heckman's] short-term sickness and unemployment benefits that he received;

(2) \$6,018.83 to satisfy a lien . . . for short-term disability benefits that [Heckman] received; and

(3) \$6,202.70 to satisfy [BNSF's] purported obligation to withhold and pay the Internal Revenue Service for [Heckman's] share of [RTTA] payroll taxes on his general verdict award.

Heckman does not contest the offsets for the liens.

At the hearing on the motion for satisfaction and discharge of judgment, BNSF offered evidence to show how it determined the amount of taxes due on Heckman's general verdict award. Relying upon U.S. Railroad Retirement Board (RRB) program letter No. 2011-01 and Internal Revenue Service (IRS) 2010 instructions for IRS Form CT-1, the rate of taxes for compensation paid to Heckman in 2011 were determined as follows:

Tier 1: Employee pays 4.2% of the first \$106,800 of compensation. Railroad pays 6.2% of the first \$106,800 of compensation.

Tier 1 Medicare: Employee and railroad each pay 1.45% of compensation.

Tier 2: Employee pays 3.9% of the first \$79,200 of compensation. Railroad pays 12.1% of the first \$79,200 of compensation[.]

At the time of the judgment, Heckman's year-to-date income was \$42,891.32. This amount was deducted from the capped amount of earnings for calculating withholding amounts. BNSF calculated the withholding by using the entire amount

of the judgment, \$145,000, as lost wages. Based on this amount and using the withholding chart, it calculated the taxes as follows:

**Tier 1**      **\$2,684.16** (\$106,800 less earnings through October 11, 2011, \$42,891.32, equals \$63,908.68 multiplied by 4.2%)

**Tier 2**      **\$1,416.04** (\$79,200 less earnings through October 11, 2011, \$42,891.32, equals \$36,308.68 multiplied by 3.9%)

**Medicare** **\$2,102.50** (\$145,000 multiplied by 1.45%)

**Total:**      **\$6,202.70** [(\$2,684.16 + \$1,416.04 + \$2,102.50)]

The total, \$6,202.70, is the amount BNSF claims it is required to withhold and pay to the IRS. Heckman does not dispute the accuracy of the computations but claims the law does not require BNSF to withhold the \$6,202.70.

The district court overruled BNSF's motion for satisfaction and discharge of judgment and ordered that "no portion of the general verdict shall be attributable to [Heckman's] wage loss claim." The court concluded that because a general verdict was rendered, it had no way of knowing what portion, if any, of the verdict the jury apportioned for wage loss and that the issue could not be relitigated. It directed BNSF to pay \$6,202.70 to the clerk of the district court for Box Butte County for distribution to Heckman.

BNSF moved for rehearing. The district court revised its order and directed the parties to agree in writing that no portion of the award would be considered lost wages, "so as not to place BNSF at odds with the statutory requirement to pay the [RRTA] Taxes to the IRS as permitted by the rules."

BNSF appealed, and we granted the petition to bypass.

#### IV. ASSIGNMENTS OF ERROR

BNSF claims, summarized and restated, that the district court erred in not entering a satisfaction and discharge of the judgment against BNSF and ordering the parties to agree in writing that no portion of the verdict was for lost wages.

#### V. ANALYSIS

Heckman claims that BNSF has not presented evidence it paid the \$6,202.70 to anyone and that, therefore, the district

court did not err in refusing to enter a satisfaction of the judgment. In the interest of judicial economy, we proceed to examine BNSF's assignments of error.

The first question is whether in Nebraska a general jury verdict is presumed to rule in favor of the successful party on all issues presented to the jury. The second question is whether any portion of the general verdict can be considered to be lost wages and therefore be treated as compensation under the RRTA. The final question is, If part of the verdict is compensation, does the court, after a general verdict has been entered, have authority to order the parties to agree in writing that no portion of the verdict will be considered lost wages?

#### 1. GENERAL JURY VERDICT IN NEBRASKA

[2,3] The jury returned a general verdict in favor of Heckman and against BNSF. A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant. *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013). Because a general verdict does not specify the basis for an award, Nebraska law presumes that the winning party prevailed on all issues presented to the jury. See *id.* In a FELA suit against BNSF, we held that the trial court's failure to give a requested apportionment instruction was not reversible error because the jury, through its general verdict, presumptively held in favor of the plaintiff on all causes of action. See *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997).

[4] In disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretative decisions of the federal courts construing the act. *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010). In Nebraska, general verdicts are controlled by statute as part of our procedural rules. See Neb. Rev. Stat. § 25-1122 (Reissue 2008).

BNSF argues that because the general verdict was based in part on lost wages, federal law requires that the entire award

be treated as compensation and subject to withholding under the RRTA. Heckman argues that the verdict does not set forth how damages were allocated, so no amount of the award can be considered lost wages.

The district court determined that because a general verdict was rendered, the court had no way of knowing what portion of the verdict the jury apportioned to lost wages. The court concluded that because it could not determine what portion of the award was allocated to lost wages, no portion of the award would be considered lost wages.

The district court misinterpreted Nebraska precedent regarding general verdicts. A correct reading of our precedent establishes a presumption that when the jury returns a general verdict in favor of one party, we presume that the jury found in favor of the successful party on all issues raised by that party and presented to the jury. See *Wulf, supra*.

Heckman has referred us to *Mickey v. BNSF R. Co.*, No. ED 98647, 2013 WL 2489832 (Mo. App. June 11, 2013), a recent unpublished decision from the Court of Appeals for the eastern district of Missouri. In *Mickey*, the appellate court concluded that the trial court did not have power to modify the judgment once it became final. Following judgment, the trial court's authority was limited to issuing orders necessary to execute the judgment.

In *Mickey*, the court stated that pursuant to its interpretation of Missouri law, a general verdict could not be interpreted as a finding by the jury for lost wages. The plaintiff sought to enforce his judgment against BNSF and Safeco Insurance Company of America (Safeco) as BNSF's surety on a supersedeas bond for the amount which BNSF claimed was required to be withheld under federal law. The trial court found that BNSF failed to satisfy the judgment and entered judgment on the supersedeas bond in the amount of \$12,820.80 plus interest.

On appeal, BNSF and Safeco argued that BNSF satisfied the judgment by fulfilling its obligation under federal law to withhold the plaintiff's portion of railroad employment taxes. The appellate court disagreed and cited Missouri's procedural rules, which stated that "[t]he verdict of a jury is either general or

special.’” *Id.* at \*4. It concluded that because the general verdict did not specify individual items such as lost wages, the amount of lost wages as compensation was “‘a matter forever relegated to the bosom of the jury.’” *Id.*

The court in *Mickey* concluded that after a verdict has been rendered and the jury discharged, the “‘trial court has no authority to correct or amend [the judgment] in matters of substance, only in mere matters of form.’” *Id.* at \*5 (quoting *Kansas City Power & Light v. Bibb & Assoc.*, 197 S.W.3d 147 (Mo. App. 2006)). BNSF had not requested any changes when the trial court entered its judgment, and on direct appeal, did not challenge the form of the judgment. Because the judgment did not allocate any specific amount of damages to lost wages, the court was unable to conclude that 45 U.S.C. § 231(h)(2) (2006) applied. The court saw no basis in Missouri law to withhold taxes on a judgment based on time lost.

The *Mickey* court distinguished two unpublished trial court orders in FELA cases which BNSF relied upon for its argument that it properly withheld railroad employment taxes because the judgment was held to be pay for “time lost.” The court in *Mickey* stated that in “*Nielsen v. BNSF Railway Company*[, No. 0807-10580 (Multnomah County, Or. Mar. 5, 2012),] the jury specifically awarded the plaintiff damages for lost wages.” 2013 WL 2489832 at \*6. Further, “[i]n *Phillips v. Chicago, Central & Pacific Railroad Company*, [No. 04781 LACV 098439 (Pottawattamie County, Iowa Apr. 12, 2013),] the trial court appeared to apportion damages to a specific category, (‘time lost’) after the judgment was final.” 2013 WL 2489832 at \*6.

We agree that the two trial court orders relied upon in *Mickey*, *supra*, are distinguishable. But we also distinguish *Mickey*, because with a general verdict, we presume that the jury found in favor of Heckman on all issues, including lost wages. See, § 25-1122; *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013). Our focus is whether any of the verdict was based on lost wages. To determine if Heckman’s award was based on lost wages, we look to the pleadings, evidence presented at trial, and the instructions given to the jury. See RRB Legal Opinion L-92-18 (Feb. 25, 1992).

Examining all three of these elements, we conclude that the jury verdict was based in part on Heckman's lost wages. Heckman alleged in his complaint that his damages included lost wages. He presented evidence at trial about his lost wages, and the jury was instructed it could take into account his lost wages if it returned a verdict in Heckman's favor. It would be error to conclude that because the jury returned a general verdict, no portion of the verdict could be considered lost wages. To do so would require the district court to conclude that the jury did not base any damages on Heckman's lost wages. This is contrary to the presumption that with a general verdict, the jury is presumed to have found in favor of the successful party on all issues raised by that party. See *Wulf*, *supra*. Part of Heckman's claim was for lost wages. Therefore, the district court erred in concluding that no portion of the general jury verdict could be considered lost wages.

## 2. COMPENSATION

### (a) Background

Because we conclude that under Nebraska's procedural rules, Heckman's verdict was based in part on lost wages, we turn to federal substantive law to determine if his lost wages verdict is considered compensation.

Railroad employees do not receive Social Security benefits. See *Hance v. Norfolk Southern Ry. Co.*, 571 F.3d 511 (6th Cir. 2009). Instead, they receive retirement benefits under the Railroad Retirement Act of 1974 (RRA). See, 45 U.S.C. § 231b(a)(1) (calculating annuity amount) (2006); 45 U.S.C. § 231t (2006). The RRA applies to railroad companies and their employees. See 45 U.S.C. § 231(a) and (b). The RRA is administered by the RRB. See 45 U.S.C. § 231f (2006 & Supp. V 2011). RRA benefits are funded through payroll taxes assessed against both the employee and the employer under the RRTA. See I.R.C. § 3201 et seq. (2006 & Supp. V 2011).

RRTA taxes are divided into tax tiers 1 and 2. See I.R.C. § 3201(a) and (b). Tier 1 RRTA taxes are similar to taxes imposed on nonrailroad workers by the Federal Insurance Contributions Act (FICA), I.R.C. § 3101 et seq. (2006 & Supp. V 2011), and RRTA taxes are paid in lieu of FICA taxes.

Tier 1 taxes fund retirement and disability payments. Railroad employees covered by the RRA and subject to the RRTA also pay an additional tier 2 RRTA tax, which funds a separate annuity that is equivalent to a private benefit. FICA taxes do not have an equivalent tier 2 component.

Both tier 1 and tier 2 RRTA taxes are imposed on all compensation earned by a railroad employee. See I.R.C. § 3201(a) and (b). The RRA defines compensation as “any form of money remuneration paid to an individual for services rendered as an employee . . . including remuneration paid for time lost as an employee.” 45 U.S.C. § 231(h)(1). See, also, I.R.C. § 3231(e)(1) (“‘compensation’ means any form of money remuneration paid to an individual for services rendered as an employee”).

#### (b) Resolution

Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013). Since we have concluded that part of the general verdict was an award for time lost, we apply federal law to determine if the time lost was compensation subject to withholding under the RRTA. And if part of the award is compensation, what amount of the award is compensation subject to withholding?

[5-7] For purposes of the RRA, the definition of compensation includes payments for time lost. See 45 U.S.C. § 231(h)(2). An employee is deemed to be paid “for time lost” the amount he is paid by an employer for an identifiable period of absence, including absence on account of personal injury. See *id.* The statute provides guidance for allocating pay for time lost:

If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the *total payment shall be deemed to be paid for time lost* unless, at the time of payment, a part of such payment is *specifically apportioned* to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

*Id.* (emphasis supplied). See, also, 20 C.F.R. § 211.2(b)(2) (2013) (compensation includes pay for time lost as employee); 20 C.F.R. § 211.3(a)(1) (2013) (pay for time lost as employee includes pay received for certain period of time due to personal injury). The RRA presumes that payments for personal injury are compensation for time lost unless they are specifically apportioned otherwise. See 45 U.S.C. § 231(h)(2).

The IRS considers FELA judgments for “time lost” to be compensation, unless specifically excepted. See, I.R.C. § 3121(a); *Cheetham v. CSX Transp.*, No. 3:06-CV-704-J-PAM-TEM, 2012 WL 1424168 (M.D. Fla. Feb. 13, 2012). Treasury regulation § 31.3231(e)-1(a)(3) (2003) provides that “compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer.” Compensation under the treasury regulations also includes “pay for time lost.” Treas. Reg. § 31.3231(e)-1(a)(4).

Whether compensation is paid for work performed or for time lost, the RRTA requires employers to collect all RRTA taxes imposed under I.R.C. § 3201 “by deducting the amount of the taxes from the compensation of the employee as and when paid.” I.R.C. § 3202(a). Every employer is required to deduct RRTA taxes from employees’ compensation. Employers are liable for the payment of such tax and “shall not be liable to any person for the amount of any such payment.” I.R.C. § 3202(b). Treasury regulations also provide that an employer “is not liable to any person for the amount of the employee [RRTA] tax deducted by him” and paid to the IRS. Treas. Reg. § 31.3202-1(e) (1994).

As stated in I.R.C. § 3202(b), a railroad employer is liable to the IRS for the employee’s portion of RRTA taxes and the employer is not liable to any other person for the amounts deducted. Thus, under I.R.C. § 3202(b), a railroad employer must withhold RRTA taxes from compensation paid to employees and must remit the taxes to the IRS. If the employer fails to remit the employee portion of the tax, both the employer and the employee remain liable for the unremitted amount. Treas. Reg. § 31.3202-1(e). Based on the definition of compensation

as stated in the RRA and RRTA and the agencies' interpretations found in federal regulations, we conclude that time lost is compensation that is subject to taxation. Time lost is equated with lost wages.

Having determined that time lost is compensation and that the verdict in favor of Heckman was based in part on time lost, we must now determine what part of the general verdict is subject to taxation under the RRTA. The RRB, the federal agency charged with administering the RRA and funded by the RRTA, has issued legal opinions that provide guidance in answering this question.

[8] The RRB's opinions indicate that absent specific allocations to other components, the RRB treats the total FELA award as pay for time lost if the payment for personal injury is based in part on pay for time lost. See, RRB Legal Opinions L-87-91 (July 1, 1987) and L-92-18. When a jury returns a general verdict in a lump sum, the RRB has interpreted 45 U.S.C. § 231(h) to require payment of RRTA taxes on the entire judgment amount. RRB Legal Opinion L-87-91. It concluded when "no part of the verdict was allocated to factors other than pay for time lost, [then] the whole verdict may be considered pay for time lost." *Id.* The RRB has stated:

If one of the claims for damages is lost wages and the jury was instructed that it could include lost wages in determining damages, then it can be concluded that the judgment is, at least in part, based on pay for time lost. If this is so, under [45 U.S.C. § 231](h)(2) . . . the entire amount is pay for time lost.

RRB Legal Opinion L-92-18.

For guidance, the RRB suggested that the types of damages included in the jury verdict could be inferred by examining a copy of the complaint filed by the injured party and the instructions submitted to the jury. *Id.* In the case at bar, we have concluded that part of Heckman's damages included lost wages. Therefore, Heckman's general verdict, based in part on lost wages, would be deemed paid entirely for lost wages and therefore subject to RRTA taxes on the entire verdict.

The federal circuits have also determined that under the RRTA, general awards based at least in part on lost wages

are taxed on their entire amount. The Sixth Circuit has held that payments for personal injury are considered compensation for time lost. In *Hance v. Norfolk Southern Ry. Co.*, 571 F.3d 511 (6th Cir. 2009), the plaintiff brought a claim against his employer for a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994. Part of his complaint alleged damages for backpay and lost benefits. The Sixth Circuit concluded that the backpay award was compensation for time lost and that the employer had to pay tiers 1 and 2 taxes on the backpay award.

In the case at bar, the district court relied on *Jacques v. United States R.R. Retirement Bd.*, 736 F.2d 34 (2d Cir. 1984). In *Jacques*, the defendant was injured while working for his railroad employer. He sued under FELA, and the case was settled. The settlement did not indicate how the money was to be allocated among the different categories of damages alleged in the complaint, including 5 months of time lost for personal injury. When the defendant filed for a disability annuity under the RRA, his claim was denied because he had not met the minimum months of service to be eligible for disability. The defendant was 4 months short of the minimum 234 months to be eligible for a disability annuity. The RRB refused to take into account the months the defendant was absent from work due to his disability, for which he was compensated in his FELA settlement.

The Second Circuit concluded that because the settlement was not broken down by categories of damages, the entire award had to be treated as compensation for each of the damages alleged in the complaint, including time lost. It held: "Under the provisions of section 231(h)(2), the whole payment is therefore deemed to have been for time lost . . . ." *Jacques*, 736 F.2d at 39. The court concluded its analysis of compensation paid for time lost by stating:

Finally, we note that, in the absence of specific substantial evidence to the contrary, any reasonable mind would decide that compensation paid (1) by an employer, (2) to an employee, (3) for an accident that took place while the employee was performing his regular duties, and (4) that caused the employee to be out of work for six

months is compensation paid—at least in part—for lost time. To suggest otherwise is to strain logic well beyond its breaking point.

*Id.* at 41-42.

Citing *Jacques*, the district court concluded that BNSF “should not be able to unilaterally decide to apportion the entirety of a general verdict to wage loss when it finds it beneficial or no portions [sic] in situations when it attempts to deny retirement benefits.” The district court reasoned that the outcome affected only Heckman, because either he received his money immediately and had to forgo retirement credit or he could receive retirement credit and not receive the money immediately. Either way, BNSF had to pay the money to someone.

But the district court misinterpreted *Jacques*. Under federal law, time lost for personal injury is deemed to be compensation. When a jury returns a general verdict based in part on time lost, the entire award is considered compensation and is subject to taxation.

Because the jury returned a general verdict that was based in part on Heckman’s lost wages, we presume that he prevailed on all issues presented to the jury and that Heckman was awarded lost wages. The district court failed to recognize that absent specific allocations to other components, the award is deemed compensation for lost wages. See, 45 U.S.C. § 231(h)(2); RRB Legal Opinions L-87-91 and L-92-18. Classification of the award as compensation affects both Heckman and BNSF because it triggers obligations and benefits of both parties under the RRA. BNSF is required to pay tiers 1 and 2 taxes, and Heckman receives retirement benefits for the amount of time he was absent due to his personal injury.

3. ORDER DIRECTING PARTIES TO AGREE  
NO PORTION OF AWARD CONSIDERED  
LOST WAGES

The district court concluded, and Heckman agrees, that the parties could negotiate to allocate portions of the jury verdict. The court ordered the parties to agree in writing that no portion

of the verdict would be considered lost wages “so as not to place BNSF at odds with the statutory requirement to pay the [RRTA] Taxes to the IRS as permitted by the rules.”

Heckman argues that because neither party asked for a special verdict and the jury returned a general verdict, the district court could not construe what portion of that award, if any, is attributable to lost wages. We have resolved this issue against Heckman.

BNSF argues that although an employer and employee can negotiate and allocate what portion of a settlement agreement should be deemed lost wages, the jury decided the appropriate compensation for Heckman’s injuries. Therefore, it is too late for the parties to agree to allocation and BNSF is obligated to pay taxes on the entire verdict. BNSF contends that paying the RRTA taxes on the entire verdict places Heckman in the same position he would have been in had he not been injured, because BNSF would have paid RRTA taxes on his compensation while he was working in return for credit to Heckman’s retirement account.

[9] Employers and employees can negotiate settlement agreements and allocate portions of a settlement award to lost wages and other compensatory categories. See 45 U.S.C. § 231(h). During settlement, parties may agree that no portion of the award is attributable to lost wages. That decision rests largely with the employer on how it wishes to allocate the settlement. See 20 C.F.R. § 211.3(a)(2). Heckman and BNSF could have entered into settlement negotiations and determined what portion, if any, of a settlement award would be allocated to time lost. See, 45 U.S.C. § 231(h); 20 C.F.R. § 211.3. But they were not able to do so.

Instead, this matter was ultimately decided by a jury. When the jury returned a general verdict based in part on Heckman’s claim of lost wages, substantive federal law controlled the allocation of the award to lost wages. See 45 U.S.C. § 231(h)(2). The court could not force the parties to agree to change the basis of the verdict. We find no authority that would permit the court to order BNSF to agree to an allocation of the settlement after the verdict was entered. See 20 C.F.R. § 211.3(a)(2). Because the verdict was based in part

on lost wages and no damages were specifically apportioned, the entire verdict is deemed compensation for lost wages. See 45 U.S.C. § 231(h)(2). Therefore, the entire award became subject to RRTA taxes. See I.R.C. § 3121(a). Under the RRA, the entire award is compensation subject to RRTA taxes that must be paid by the employer.

The district court erred when it required that the parties agree in writing that no portion of the general verdict could be considered lost wages to avoid BNSF's obligation to pay RRTA taxes on Heckman's entire award.

## VI. CONCLUSION

We conclude that Heckman's entire award was compensation subject to RRTA taxation. The district court erred in denying BNSF's motion for satisfaction and discharge of judgment and ordering that the parties agree in writing that no portion of the general verdict was based on lost wages. Therefore, we reverse the judgment and remand the cause with directions that the district court enter a satisfaction and discharge of the judgment upon proof of payment of \$6,202.70 by BNSF to the IRS on account of the lost wages paid to Heckman.

REVERSED AND REMANDED WITH DIRECTIONS.

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SHERMAN T., INDIVIDUALLY AND AS NEXT  
FRIEND OF BRAYDEN N., APPELLANT,  
v. KARYN N., APPELLEE.  
837 N.W.2d 746

Filed August 16, 2013. No. S-12-515.

1. **Trial: Courts.** A court cannot err with respect to a matter not submitted to it for disposition.
2. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
3. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests.
4. **Motions to Dismiss: Rules of the Supreme Court: Jurisdiction: Pleadings: Service of Process.** When a motion to dismiss raises both Neb. Ct. R. Pldg. § 6-1112(b)(1) and § 6-1112(b)(6), the court should consider dismissal under

§ 6-1112(b)(1) first and should then consider § 6-1112(b)(6) only if it determines that it has subject matter jurisdiction. Similarly, when a motion to dismiss raises § 6-1112(b)(6) and any combination of § 6-1112(b)(2), (4), and (5), the court should consider dismissal under § 6-1112(b)(2), (4), and (5) first and should then consider dismissal under § 6-1112(b)(6) only if it determines that it has personal jurisdiction and that process and service of process were sufficient.

5. **Motions to Dismiss: Rules of the Supreme Court: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6).
6. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
7. **Constitutional Law: Due Process: Equal Protection: Statutes: Presumptions: Proof.** Where a statute is challenged under either the Due Process Clause or the Equal Protection Clause of the state and federal Constitutions, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.
8. **Due Process.** The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.
9. \_\_\_\_\_. A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.
10. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
11. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
12. \_\_\_\_\_. In an equal protection challenge, once the challenger establishes that he or she is similarly situated to another group, the analysis then focuses on whether the challenger is receiving dissimilar treatment pursuant to the statute at issue as compared to the similarly situated group. Such dissimilar treatment caused by the statutory classification does not constitute a violation of the challenger's right to equal protection if the statutory classification promotes a legitimate government interest or purpose.

13. **Equal Protection: Statutes.** In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive.
14. **Constitutional Law: Statutes.** Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Willow T. Head, of Law Offices of Willow T. Head, P.C., L.L.O., for appellant.

Stephanie Weber Milone for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

### INTRODUCTION

This is an appeal from the dismissal of a paternity action brought by Sherman T., who claims to be the biological father of Brayden N. He filed an amended complaint with the district court to establish paternity both as an individual and on behalf of Brayden as “next friend.” Alternatively, Sherman asked the district court to find Neb. Rev. Stat. § 43-1411 (Reissue 2008) unconstitutional, because it denied him due process and equal protection under both the state and federal Constitutions. Karyn N., Brayden’s mother, filed an answer and counterclaim in response and later filed a motion to dismiss Sherman’s amended complaint.

The district court dismissed with prejudice the amended complaint filed by Sherman as an individual as untimely. The court also dismissed the amended complaint with prejudice as to Sherman’s filing as the next friend of Brayden, finding suit may be brought on behalf of a child as next friend only when said child lacks a guardian. Finally, the court dismissed Karyn’s counterclaim without prejudice.

Sherman claims the district court erred in dismissing the amended complaint filed by Sherman as an individual because Karyn waived a statute of limitations defense. Sherman further argues that the district court erred in dismissing Karyn's counterclaim and that the application of Nebraska's paternity statute to his case violates his rights to due process and equal protection. We affirm in part and in part reverse the order of the district court.

### FACTUAL BACKGROUND

Karyn is the biological mother of Brayden. Brayden was born out of wedlock in 2005. Six years later, on September 15, 2011, Sherman filed a complaint, both individually and as Brayden's next friend, in the district court for Douglas County, seeking to establish paternity.

Karyn moved to dismiss Sherman's paternity complaint on September 26, 2011. Karyn's motion to dismiss asserted, among other arguments, that Sherman's complaint was filed out of the 4-year statute of limitations for paternity actions pursuant to § 43-1411. Two days later, on September 28, Sherman moved for leave to amend his complaint. The district court granted Sherman leave to amend without considering Karyn's motion to dismiss. On October 13, Sherman filed his amended complaint both individually and as Brayden's "next friend," seeking to establish paternity.

In his amended complaint, Sherman again alleged that he and Karyn had had sexual intercourse, which may have resulted in the birth of Brayden, and that Sherman is believed to be the father of Brayden. Sherman's amended complaint also requested that the 4-year statute of limitations period of § 43-1411 be tolled because Sherman was allegedly incapacitated and receiving medical treatment out of the country around the time of the child's birth, and as such, Sherman lacked actual knowledge of the child's birth. In the event the district court did not toll the 4-year statute of limitations, Sherman requested an order finding that § 43-1411 is unconstitutional. Sherman argued that the statute should be found unconstitutional because:

A. The statute as applied would deny [Sherman] due process and equal protection under the 14<sup>th</sup> Amendment to the United States Constitution and Article I-3 of the Nebraska State Constitution.

B. The statute as applied would deny [Sherman] due process and equal protection and there is no compelling public policy interests that currently exist to deny [Sherman, the] alleged father[,] the opportunity to establish paternity and pursue parental rights under the facts of this case. The results of strict application of the statute would contradict the original legislative intent.

C. The statute, if not tolled[,] would be unconstitutional as it would deny [Sherman] his fundamental constitutional right to parent his child.

On October 24, 2011, Karyn entered a voluntary appearance in the case. On November 16, Karyn filed an answer to Sherman's amended complaint, arguing numerous defenses to Sherman's claims, and filed a counterclaim to Sherman's amended complaint. Karyn's counterclaim for child support acknowledged that she and Sherman had sexual intercourse and that Sherman may be the father of Brayden. The counterclaim also mentioned that a separate paternity action, filed by the State on behalf of Brayden, was already pending in which both she and Sherman were named defendants. On November 18, Sherman filed a reply and answer to Karyn's counterclaim, praying for dismissal of Karyn's counterclaim.

On November 23, 2011, the district court denied Karyn's first motion to dismiss. On February 3, 2012, Karyn filed a second motion seeking dismissal of Sherman's amended complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1), (2), and (6), and (d) for lack of jurisdiction over the subject matter, lack of jurisdiction over the person, and failure to state a claim upon which relief can be granted, respectively. Specifically, Karyn argued that Sherman's individual action was barred by the 4-year statute of limitations. Karyn's motion also argued that Sherman lacked standing to assert paternity as Brayden's "next friend." Such cause of action, Karyn asserted, does not belong to Sherman, but, rather, to Brayden in the event he

lacked a guardian. Since his birth, however, Karyn alleged that Brayden has always been in her custody. Karyn also argued that she had not been properly served with process. And finally, Karyn contended that Sherman does not possess the capacity to sue or be sued, because Sherman's legal counsel had advised that Sherman had suffered an aneurysm rupture and paralysis.

On February 21, 2012, Sherman filed an objection to Karyn's motion to dismiss. Karyn's motion to dismiss came on for a hearing wherein both Sherman and Karyn were represented by counsel. We have no record or transcript of the February 21 hearing on Karyn's motion to dismiss.

Karyn's motion to dismiss was granted by the district court in a written order filed May 9, 2011. The district court held that the amended complaint for paternity filed by Sherman as an individual should be dismissed with prejudice because it is barred by the statute of limitations. The court further found that the amended complaint for paternity as the next friend of Brayden should be dismissed with prejudice because a next friend action may be brought only when the child at issue lacks a guardian. The court found that pursuant to Neb. Rev. Stat. § 30-2608(a) (Reissue 2008), Karyn, as the biological mother of Brayden, born out of wedlock, was Brayden's "natural guardian," and that therefore, a next friend could not act on Brayden's behalf. Finally, the court found that as Karyn's counterclaim was filed against "a Plaintiff who has no capacity or standing to sue it constitutes an action against an individual who is not a proper party plaintiff." Therefore, the court then dismissed Karyn's counterclaim against Sherman without prejudice. The court made no findings regarding Karyn's argument that she had not been properly served with process; Karyn's allegation that Sherman's claims should be dismissed because he allegedly did not possess the capacity to sue; or Sherman's tolling argument and constitutional claims, both found in his amended complaint.

This case was never consolidated with the separate action brought by the State. Sherman now appeals. Upon reviewing Sherman's assignments of error, we find that the order of the

district court dismissing Sherman's claims with prejudice and Karyn's counterclaim without prejudice should be affirmed in part and in part reversed.

### ASSIGNMENTS OF ERROR

Sherman assigns that (1) Karyn waived the statute of limitations defense when she filed a counterclaim seeking affirmative relief and that therefore, the matter should not be time barred and dismissed; (2) the district court erred in dismissing Karyn's counterclaim on its own motion; (3) the 4-year statute of limitations provided in § 43-1411 is unconstitutional and violates the Equal Protection Clauses of the state and federal Constitutions; and (4) the 4-year statute of limitations provided in § 43-1411 is unconstitutional and violates the Due Process Clauses of the state and federal Constitutions.

### STANDARD OF REVIEW

The determination of which statute of limitations applies is a question of law.<sup>1</sup> Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.<sup>2</sup> A question of jurisdiction is a question of law.<sup>3</sup>

An appellate court reviews a district court's order granting a motion to dismiss *de novo*, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.<sup>4</sup> To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.<sup>5</sup> In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the

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<sup>1</sup> *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

<sup>2</sup> *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002).

<sup>3</sup> *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

<sup>4</sup> *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W.2d 584 (2011), *cert. denied* 565 U.S. 882, 132 S. Ct. 251, 181 L. Ed. 2d 145.

<sup>5</sup> *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.<sup>6</sup>

### ANALYSIS

#### *Whether District Court Erred in Dismissing Sherman's Claim as Time Barred.*

On appeal, Sherman raises the argument for the first time in this matter that Karyn's counterclaim for child support, in which she alleges that she and Sherman had sexual relations and that Sherman may be the father of Brayden, acts as a judicial admission. Sherman contends that such judicial admission "constitutes a waiver of all controversy" with respect to the statute of limitations issue raised in Karyn's motion to dismiss Sherman's amended complaint.<sup>7</sup> As such, Sherman argues the district court erred in dismissing his claim as time barred by the 4-year statute of limitations provided in § 43-1411.

[1,2] The record indicates, however, that Sherman failed to raise this "waiver" argument before the district court. We have held that a court cannot err with respect to a matter not submitted to it for disposition<sup>8</sup> and that an issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.<sup>9</sup> Thus, without considering whether Karyn waived the statute of limitations defense, we find that Sherman's first assignment of error is without merit.

#### *Whether District Court Erred in Dismissing Karyn's Counterclaim on Its Own Motion.*

[3] Sherman's second assignment of error addresses whether the district court erred in dismissing Karyn's counterclaim without prejudice "on its own motion." (This court notes that Sherman prayed for dismissal of Karyn's counterclaim in his

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<sup>6</sup> *Id.*

<sup>7</sup> Brief for appellant at 14.

<sup>8</sup> *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

<sup>9</sup> *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

reply filed with the district court.) Sherman does not have standing to assert this alleged error. To have standing, a litigant must assert the litigant's own rights and interests.<sup>10</sup> Sherman cites no legal authority showing that he may force Karyn to proceed on her own claim brought through her counterclaim. Thus, as Sherman lacks standing to assert that the district court erred in dismissing Karyn's counterclaim, Sherman's second assignment of error is without merit.

*Whether 4-Year Statute of Limitations Provided in § 43-1411 Is Unconstitutional and Violates Equal Protection and Due Process Clauses of State and Federal Constitutions.*

Finally, Sherman requests, as argued in both his amended complaint and appellate brief, that this court find the 4-year statute of limitations as set forth in § 43-1411 is unconstitutional as applied to the facts of his case pursuant to the Due Process and Equal Protection Clauses of the state and federal Constitutions. Section 43-1411 provides that a paternity action may be instituted by “(1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth . . . or (2) the guardian or next friend of such child or the state, either during pregnancy or within eighteen years after the child's birth.”

We note that during oral argument, counsel for Sherman affirmatively answered the question of whether Sherman was making a facial constitutional challenge to § 43-1411. As such facial challenge does not appear anywhere in Sherman's amended complaint filed with the district court or his appellate brief filed with this court, we do not construe his assignment of error as facially challenging the constitutionality of § 43-1411. Rather, we construe Sherman's amended complaint and appellate brief as assigning an “as applied” constitutional challenge.

[4] Although the district court's order does not set forth its precise reasoning, it implicitly found no merit to Sherman's constitutional claims. First, Karyn's motion asked for dismissal

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<sup>10</sup> *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011).

of Sherman's amended complaint for lack of subject matter and personal jurisdiction and for the failure to state a claim. Karyn also argued in her motion that Sherman lacked capacity to sue or be sued. We have previously concluded that when a motion to dismiss raises both § 6-1112(b)(1) and § 6-1112(b)(6), the court should consider dismissal under § 6-1112(b)(1) first and should then consider § 6-1112(b)(6) only if it determines that it has subject matter jurisdiction.<sup>11</sup> Similarly, when a motion to dismiss raises § 6-1112(b)(6) and any combination of § 6-1112(b)(2), (4), and (5), the court should consider dismissal under § 6-1112(b)(2), (4), and (5) first and should then consider dismissal under § 6-1112(b)(6) only if it determines that it has personal jurisdiction and that process and service of process were sufficient.<sup>12</sup>

Clearly, the district court has subject matter jurisdiction of an action to determine paternity of a child. See Neb. Rev. Stat. § 43-1411.01 (Reissue 2008). Similarly, the court could easily have determined that because of Karyn's voluntary appearance, the portion of the motion contesting the court's personal jurisdiction over her clearly lacked merit. Thus, we assume that the district court first found no merit to the grounds attacking subject matter or personal jurisdiction and then considered the sufficiency of the complaint to state a claim. The district court explicitly addressed and rejected Sherman's argument that he is a next friend, and the order simply concludes that the statute of limitations bars Sherman's individual action. In so doing, the district court implicitly rejected Sherman's constitutional arguments which were raised in his amended complaint. Similarly, the district court implicitly found no merit in Sherman's argument that the running of § 43-1411 should be tolled.

[5,6] We construe the district court's order as dismissing Sherman's constitutional claims for failure to state a claim pursuant to § 6-1112(b)(6). We review such cases *de novo*.<sup>13</sup>

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<sup>11</sup> *Doe*, *supra* note 5.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.*

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.<sup>14</sup>

[7] Where a statute is challenged under either the Due Process Clause or the Equal Protection Clause of the state and federal Constitutions, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.<sup>15</sup>

[8,9] It is apparent that Sherman is advancing a procedural due process claim in that Sherman asserts he should be able to establish paternity outside of the 4-year limitations period provided in the statute he challenges. The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.<sup>16</sup> A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.<sup>17</sup>

[10] Sherman also advances an equal protection claim in his amended complaint. The Equal Protection Clause of the 14th

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<sup>14</sup> *Id.*

<sup>15</sup> See *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

<sup>16</sup> *In re Interest of S.J.*, 283 Neb. 507, 810 N.W.2d 720 (2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 837, 184 L. Ed. 2d 663 (2013); *In re Interest of S.C.*, 283 Neb. 294, 810 N.W.2d 699 (2012).

<sup>17</sup> *Id.*

Amendment, § 1, mandates that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” This clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.<sup>18</sup>

[11] We have held that the initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.<sup>19</sup>

[12-14] Once the challenger establishes that he or she is similarly situated to another group, the analysis then focuses on whether the challenger is receiving dissimilar treatment pursuant to the statute at issue as compared to the similarly situated group.<sup>20</sup> Such dissimilar treatment caused by the statutory classification does not constitute a violation of the challenger’s right to equal protection if the statutory classification promotes a legitimate government interest or purpose.<sup>21</sup> In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive.<sup>22</sup> Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.<sup>23</sup>

We find Sherman’s amended complaint states both a plausible due process claim and an equal protection claim on its face. First, in accepting all the factual allegations pled regarding Sherman’s constitutional claims as true and drawing all reasonable inferences in favor of Sherman, such factual

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<sup>18</sup> *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

<sup>19</sup> *Id.*

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

allegations suggest the existence of the elements required to show both a due process and an equal protection violation. Further, the factual allegations raise a reasonable expectation that discovery will reveal evidence of these two constitutional claims. Accordingly, we reverse the district court's dismissal of Sherman's constitutional claims and remand the cause for further proceedings not inconsistent with this opinion.

### CONCLUSION

As Sherman failed to argue before the district court that Karyn waived the statute of limitations defense and, as such, the district court erred in dismissing his paternity action, Sherman's first assignment of error is meritless. We also find that Sherman does not have standing to challenge the dismissal of Karyn's counterclaim. Thus, Sherman's second assignment of error is meritless. Finally, as noted above, based upon the record before us, we reverse the district court's dismissal of Sherman's constitutional claims and remand the cause for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND  
REMANDED FOR FURTHER PROCEEDINGS.

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IN RE ESTATE OF INA WEGNER ODENREIDER, DECEASED.

CHRISTY L. NEEL, APPELLEE, V. ROBERT

WEGNER ET AL., APPELLANTS.

837 N.W.2d 756

Filed August 16, 2013. No. S-12-579.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.
4. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.

5. **Decedents' Estates: Wills.** Chapter 30, article 24, of the Nebraska Revised Statutes addresses the probate and administration of wills and provides the rules in Nebraska for both informal and formal probate of wills, including the rules for supervised administration. This chapter is based upon the Uniform Probate Code.
6. **Decedents' Estates: Pleadings.** Pursuant to Neb. Rev. Stat. § 30-2441(a) (Reissue 2008), the filing of a petition for supervised administration stays action on any informal application then pending or thereafter filed.
7. **Decedents' Estates: Courts.** Neb. Rev. Stat. § 30-2440 (Reissue 2008) provides when a probate court may grant a petition for supervised administration.
8. \_\_\_\_: \_\_\_\_\_. Once supervised administration is ordered, a probate court is granted liberal authority to direct the supervised personal representative.
9. **Decedents' Estates: Wills: Courts.** The probate or annulment of a will and the administration of a decedent's estate are reserved to state probate courts.
10. **Property: Sales.** It is impossible to sell an interest in property one does not own.

Appeal from the County Court for Dodge County: KENNETH VAMPOLA, Judge. Affirmed.

Robert A. Mooney, of Gross & Welch, P.C., L.L.O., for appellants.

William J. Bianco, of Bianco Stroh, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

## I. INTRODUCTION

This appeal involves the probate of the estate of Ina Wegner Odenreider (Ina). Robert Wegner, Mark Wegner, and Laura Sherman (collectively appellants) petitioned this court for bypass of the Nebraska Court of Appeals, contending this case presented a novel legal question involving the Nebraska Probate Code. We granted appellants' petition to bypass.

We conclude that the probate court had jurisdiction to determine the matters at issue in this estate. We further determine that the probate court did not err in ordering supervised administration of the estate and ordering the personal representative to amend the proposed distribution based upon our de novo review explained below. We affirm the order of the probate court.

## II. FACTUAL BACKGROUND

Robert is one of Ina's two sons and the personal representative of her estate. Mark and Sherman are Robert's children. Ina's other son, Joel Wegner, had three children.

Ina was married to Willis Wegner. Willis passed away in 1990. Relevant to this appeal are five parcels of land that Ina and Willis owned at the time of Willis' death. All were owned by Ina and Willis as tenants in common. Upon Willis' death, he left his one-half interest in one parcel to Ina outright. Through a trust, Willis left Ina a life estate in his one-half interest in the remaining four parcels, with certain remainder interests vested in Robert and Joel and the children of Robert and Joel.

In 1998, one of Joel's children, Christy L. Neel (Christy), filed for chapter 7 bankruptcy. She listed as one of her assets her contingent interest in Willis' trust, as noted above. Mark purchased that interest at a bankruptcy auction. The description of the interest sold at auction was not specific, but instead was described as whatever interest Christy had in the trust.

In 2005, Ina executed her last will and testament. Via a trust, she left her interest in all five parcels to Robert and Joel. If either Robert or Joel had died, his children would take Willis' half; if both had died, the trust would terminate and the assets would be distributed one-half to the children of Robert and one-half to the children of Joel. In fact, Joel predeceased Ina. In her will, Ina also bequeathed Christy \$25,000. She did not gift a cash amount to any of her other grandchildren.

Ina died in June 2010. Robert was named personal representative in Ina's will and, as such, in July 2010, filed an "Application for Informal Probate of Will and Informal Appointment of Personal Representative," pursuant to Neb. Rev. Stat. § 30-2414 (Reissue 2008). This section allows for appointment of a personal representative to administer an estate under a will without formal litigation. Upon receipt of such application, the registrar must validate the completeness of the application and accept or deny the request for appointment of a personal representative.<sup>1</sup> The registrar's findings in

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<sup>1</sup> See Neb. Rev. Stat. §§ 30-2414 through 30-2424 (Reissue 2008).

informal probate proceedings are conclusive as to all persons until superseded by a formal testacy proceeding.<sup>2</sup>

In December 2010, Robert filed an inventory of estate property as required by Neb. Rev. Stat. § 30-2467 (Reissue 2008) and filed an amended inventory in July 2011. A proposed schedule of distribution was filed on September 6. This schedule listed Mark as having Christy's interest in Ina's property. The schedule did not list the \$25,000 left to Christy in Ina's will.

On September 9, 2011, Christy filed an "Objection to Determination of Inheritance Tax and Motion for Supervised Administration." The inheritance tax objection was later withdrawn and is not relevant to this appeal. Christy provided in her motion for supervised administration that she did "not agree with the Personal Representative's handling of this case and believe[d] it would be in the best interests of all beneficiaries that the estate be supervised since correct and proper administration will affect the distribution to all beneficiaries."

A hearing was held on Christy's objection and motion on October 17, 2011, at which Christy argued that the estate was not being handled properly and that she would like a court-administered personal representative appointed. Christy asserted that pursuant to Ina's will, she was left an interest in Ina's land that would go to a trust, but that Robert, as the current personal representative, did not include this interest in the schedule of distribution for Ina's estate. Robert had expressed to Christy that he believed Christy's interest in Ina's land was sold during Christy's bankruptcy auction. Christy also noted that the personal representative did not include the \$25,000 amount left to Christy under Ina's will.

At the hearing, Robert did not necessarily object to a supervised administration of the estate, but did object to the appointment of a new personal representative. In response to Christy's contentions, Robert argued that Christy should have filed an objection to the schedule of distribution pursuant to Neb. Rev. Stat. § 30-24,104(b) (Reissue 2008) of the Nebraska Probate

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<sup>2</sup> § 30-2415(a).

Code. Robert further argued that the bankruptcy court was the proper forum to determine what Christy had sold as a part of her bankruptcy.

After considering the parties' arguments, the probate court ordered the filing of any supplemental motions and scheduled an evidentiary hearing for December 15, 2011. Primarily at issue during the December 15 hearing was what interest was sold to Mark at Christy's bankruptcy auction. In addition, Christy filed a motion with the bankruptcy court to consider that same question. The latter motion was denied by the bankruptcy court, with that court concluding the probate court was better positioned to determine that question.

At a subsequent hearing before the probate court on April 9, 2012, the probate court addressed the question of whether Christy's objection to final distribution was outside of the time period to file that motion. The probate court, citing Neb. Rev. Stat. § 30-2441(a) (Reissue 2008), found that Christy's objection was timely, because her September 9, 2011, motion for supervised administration stayed the informal probate proceedings.

On May 23, 2012, the probate court entered an order concluding that Christy's interest in Ina's share of the land was not transferred to Mark via the trustee deed following the bankruptcy sale. The probate court also approved Christy's motion for supervised administration. The probate court concluded that the personal representative had made various errors related to the distribution of the estate. Accordingly, the probate court ordered that the personal representative should (1) be supervised by the court and (2) amend the schedule of distribution to correct the errors the court found.

### III. ASSIGNMENTS OF ERROR

Appellants assign that the probate court (1) erred in failing to find that Christy failed to provide proper notice of her motion for supervised administration; (2) erred in finding that the motion for supervised administration tolled Christy's deadline to object to the distribution; (3) exceeded its jurisdiction in concluding that certain property was not sold in Christy's bankruptcy; and (4) erred in relying on parol evidence to

determine the interest sold at the bankruptcy auction, and in ignoring contemporaneous writings evidencing the sale of her further contingent interest.

#### IV. STANDARD OF REVIEW

[1-3] An appellate court reviews probate cases for error appearing on the record made in the county court.<sup>3</sup> When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.<sup>4</sup> Statutory interpretation presents a question of law that an appellate court independently reviews.<sup>5</sup>

#### V. ANALYSIS

##### 1. MOTION FOR SUPERVISED ADMINISTRATION

###### (a) Labeling and Notice Issue

[4] Appellants first argue that the probate court erred as a matter of law when it considered and granted Christy's motion for supervised administration without requiring Christy to follow the mandatory procedures set forth in the Nebraska Probate Code. Specifically, appellants contend that Christy needed to file a separate "petition" for supervised administration rather than a "motion" for supervised administration and, further, that Christy failed to serve notice of her motion to all interested parties pursuant to the probate code. Although appellants assert these arguments on appeal, they did not advance these arguments before the probate court and the probate court did not rule on these issues. We have held that a litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.<sup>6</sup> Thus, we will not address

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<sup>3</sup> *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

<sup>4</sup> *Id.*

<sup>5</sup> *Rosberg v. Vap*, 284 Neb. 104, 815 N.W.2d 867 (2012).

<sup>6</sup> *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003). See, also, *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012); *Farmers Mut. Ins. Co. v. Kment*, 265 Neb. 655, 658 N.W.2d 662 (2003).

these arguments on appeal. Appellant's first assignment of error is without merit.

(b) Motion for Supervised Administration's  
Effect on Informal Probate Proceeding

Appellants next contend that the probate court erred in finding Christy's motion for supervised administration filed pursuant to Neb. Rev. Stat. § 30-2439 (Reissue 2008) tolled Christy's 30-day deadline to object to the distribution of assets set forth in the schedule of distribution in the informal probate of Ina's estate. In order to address this assignment of error, we must review the sections of the Nebraska Probate Code relevant to this appeal.

[5] Chapter 30, article 24, of the Nebraska Revised Statutes addresses the probate and administration of wills and provides the rules in Nebraska for both informal and formal probate of wills, including the rules for supervised administration. This chapter is based upon the Uniform Probate Code. Section 30-24,104(b) provides that in informal probate:

After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

It is undisputed that Christy received the personal representative's proposed schedule of distribution on September 1, 2011. The personal representative filed the schedule of distribution on September 6. Christy filed her motion for supervised administration on September 9, after reviewing the proposed schedule of distribution with counsel. Christy's motion for supervised administration was scheduled for hearing on September 26. The hearing was postponed, however, until October 17, because counsel for the personal representative had a scheduling conflict. On November 8, Christy filed an objection to the proposed distribution.

Appellants argue that Christy's objection was untimely pursuant to § 30-24,104(b) because this section requires that a beneficiary object to the schedule of distribution in an informal probate matter within 30 days of receiving the proposed distribution. Here, Christy received the proposed distribution on September 1, 2011. Although she filed her motion for supervised administration on September 9, in which she alleged the estate was not being properly handled regarding distribution to the beneficiaries, she did not file her objection to final distribution in the informal probate until November 8. Thus, pursuant to the plain language of § 30-24,104(b), Christy's objection was indeed untimely.

In addressing this issue of untimeliness, the probate court, relying on § 30-2441(a), found that Christy's motion for supervised administration filed September 9, 2011, stayed action related to the informal probate proceeding. Because of this, the probate court found Christy's objection was timely filed.

Section 30-2441 explains a petition for supervised administration's effect on other proceedings:

(a) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

(b) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by section 30-2425.

(c) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

[6] Pursuant to § 30-2441(a), the filing of a petition for supervised administration stays action on any informal application then pending or thereafter filed. Here, however, the application had been previously probated. Thus, § 30-2441(a) was inapplicable to the facts of this case. Because the will had been

previously probated in informal proceedings, § 30-2441(b) was instead applicable.

Section 30-2441(b) provides that “the effect of the filing of a petition for supervised administration *is as provided for formal testacy proceedings by section 30-2425.*” (Emphasis supplied.) Neb. Rev. Stat. § 30-2425 (Reissue 2008) provides in part:

A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

Pursuant to § 30-2425, a petition for supervised administration may be filed without regard to whether the same or a conflicting will has been informally probated. And once a petition for supervised administration is filed, the previously appointed personal representative must refrain from exercising his power to make any further distribution of the estate during

the pendency of the formal proceeding. Thus, we conclude that, although the will at issue in this case had been previously probated in informal proceedings, Christy had the right to file a motion for supervised administration with the probate court. The filing of this motion prevented Robert, as the current personal representative, from making any distribution under Ina's will.

[7] We must, therefore, consider whether Christy's concerns about the distribution were properly addressed through Christy's motion for supervised administration. Neb. Rev. Stat. § 30-2440 (Reissue 2008) provides when a probate court may grant a petition for supervised administration:

A petition for supervised administration may be filed by any interested person or by a personal representative at any time . . . . If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied. [T]he court shall order supervised administration of a decedent's estate . . . if the court finds that supervised administration is necessary under the circumstances.

This section mandates that once a petition for supervised administration is filed, a probate court must adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative if these issues have not been previously adjudicated, even though the motion may end up being denied. In this case, the probate court held a hearing on October 17, 2011, adjudicating the testacy of Ina and addressing the questions relating to the priority and qualifications of Robert as the personal representative. After holding such hearing, § 30-2440 allows a probate court to order supervised administration "if the court finds that supervised administration is necessary under the circumstances." In our de novo review of the record, we find the probate court did not err in ordering supervised administration in this case, because it found that the personal representative had made errors in the proposed distribution.

[8] And once supervised administration is ordered, a probate court is granted liberal authority to direct the supervised personal representative. Section 30-2439 provides that “[a] supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party.” Thus, pursuant to § 30-2439, the probate court was well within its province to order, on its own motion, the personal representative to adjust the proposed distribution to correct the errors concerning the estate. A proper result will not be reversed merely because it was reached for the wrong reason.<sup>7</sup> We conclude that although the probate court erred in its reasoning, it nevertheless had the authority to order supervised administration and to direct the personal representative to amend the proposed distribution. Appellants’ second assignment of error is without merit.

## 2. JURISDICTION

Appellants next assign that the probate court did not have jurisdiction to resolve the question of what was sold at Christy’s 1998 bankruptcy auction. Appellants claim that the federal bankruptcy court had exclusive jurisdiction to address this matter.

Christy’s claim of supervised administration involves the administration of an estate and the probate of a will. Neb. Rev. Stat. § 24-517 (Cum. Supp. 2012) provides that each county court shall have the following jurisdiction: Exclusive original jurisdiction of all matters relating to decedents’ estates, including the probate of wills and the construction therefor. Furthermore, Neb. Rev. Stat. § 30-2211 (Cum. Supp. 2012) grants the county courts jurisdiction over all subject matter relating to estates of decedents, including the determination of heirs and successors of decedents. Ultimately, this case deals with the construction and probate of Ina’s will and the inheritance of her heirs, in light of Christy’s prior bankruptcy filing.

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<sup>7</sup> See, e.g., *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997).

[9] As discussed in the U.S. Supreme Court decision in *Marshall v. Marshall*,<sup>8</sup> the probate or annulment of a will and the administration of a decedent's estate are reserved to state probate courts. *Marshall* further discussed in dicta instances in which conflicts over the same property may arise both in federal bankruptcy proceedings and in state probate proceedings, and discussed instances in which federal courts may have "exclusive jurisdiction" over the subject matter.<sup>9</sup> Nothing in *Marshall* compels this court to conclude that the federal bankruptcy court had exclusive jurisdiction over the matters at issue in this case. And in any case, Christy filed a motion with the bankruptcy court to determine what interest was sold to Mark at the bankruptcy auction. That motion was denied by the bankruptcy court, with that court concluding the probate court was better positioned to determine the question.

For the above reasons, we find the probate court had jurisdiction to hear this matter as it related to Ina's estate. Appellants' third assignment of error is without merit.

### 3. PAROL EVIDENCE

Finally, appellants assign that the probate court erred in relying on parol evidence to determine the interest sold at the bankruptcy auction and in ignoring contemporaneous writings evidencing the sale of Christy's contingent interest in Ina's land. Specifically, appellants claim the probate court erred in relying on the testimony of a bankruptcy trustee and his recollection of what Christy sold and by ignoring the written auction notice related to the sale. At the hearing, the trustee stated that the assets in Christy's bankruptcy estate included "[a]ll the assets, tangible and intangible . . . that existed as of the moment of the filing of the bankruptcy case." The auction notice provides in part: "We are selling a remainder interest (1/6th total) and buyer will receive their [sic] interest upon death or transfer or current life estate."

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<sup>8</sup> *Marshall v. Marshall*, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006).

<sup>9</sup> *Id.*

According to appellants, the “1/6th total” represents Christy’s fractional interest in both Willis’ and Ina’s land, and thus they claim that both of these interests were sold at the bankruptcy auction.

Pursuant to 11 U.S.C. § 541 (2006), a bankruptcy estate includes any interest in property if such interest had been an interest of the debtor on the date of the filing of the petition and the debtor “acquires or becomes entitled to acquire within 180 days after such date” by bequest, devise, or inheritance. Christy filed for bankruptcy on May 13, 1998. At that point in time, Christy had an interest in Willis’ land; however, Christy had no interest in Ina’s land. The Nebraska law of wills has long provided that a devisee acquires no interest in property by the mere execution of a will. It is an elementary rule that the provisions of a will take effect and become operative at the time of the death of the testator.<sup>10</sup> The will always speaks from the date of the testator’s death, and speaks conclusively as of that particular date.<sup>11</sup> We have stated the same principles another way. A will is, according to law, of an ambulatory character, and no person can have any rights in it until the testator is dead.<sup>12</sup> Thus, Christy did not “acquire” or “become entitled to acquire” any interest in Ina’s land until Ina’s death in June 2010. Even if federal bankruptcy law, during the testator’s lifetime, would treat a devisee as one “entitled to acquire” the subject of the devise, Christy had no such interest at the time of her bankruptcy in 1998. Ina signed the first version of her will on January 3, 2001. The final version of the will was executed in 2005. The 180-day period specified in 11 U.S.C. § 541(a)(5) had long expired by the time Ina signed the first version of her will.

We note that after the probate court issued its final order in this case, appellants filed a motion for rehearing, presenting the 2001 will mentioned above and a version of Ina’s will purportedly drafted in 1993. The 1993 will, however, was not

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<sup>10</sup> *Smullin v. Wharton*, 83 Neb. 328, 119 N.W. 773 (1909).

<sup>11</sup> *In re Estate of Dimmitt*, 141 Neb. 413, 3 N.W.2d 752 (1942).

<sup>12</sup> *Muse v. Stewart*, 173 Neb. 520, 113 N.W.2d 644 (1962).

signed by Ina, and there was no evidence presented that it was ever executed. We therefore disregard this evidence, just as the probate court did.

We find the probate court did not consider “parol evidence” or fail to give proper weight to the auction notice. The deed at issue in this case was silent as to the fractional interest in land sold at the bankruptcy auction. Thus, the probate court reviewed the evidence presented by the parties to determine what was sold pursuant to this deed. Although the probate court noted the trustee’s testimony in its order, its decision regarding what was sold pursuant to Christy’s bankruptcy was not based solely upon that testimony. Instead, the probate court’s decision was ultimately based upon the facts that Ina’s will did not exist at the time of the sale and also that Ina was not deceased at the time of the sale. Based upon this evidence, the probate court appropriately disregarded the notice and concluded that the “1/6th total” interest written on the notice appeared to be inaccurate.

[10] As Christy’s interest in Ina’s land did not arise before Christy’s bankruptcy filing on May 13, 1998, or within 180 days after the filing, the probate court found such interest did not fall within the confines of and was not part of Christy’s bankruptcy estate. Only Christy’s interest in Willis’ share of the land was conveyed to Mark via the deed. No part of Ina’s interest in the property was conveyed to Mark at that point. Thus, we agree with the probate court’s finding. It is impossible to sell an interest in property one does not own.<sup>13</sup> As such, we find that the probate court made the correct determination regarding what Christy was entitled to through Ina’s estate. Appellants’ final assignment of error is without merit.

## VI. CONCLUSION

The order of the probate court is affirmed.

AFFIRMED.

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<sup>13</sup> Cf. *State ex. rel. Counsel for Dis. v. Phillips*, 284 Neb. 940, 824 N.W.2d 376 (2012).

STATE OF NEBRASKA, APPELLEE, V.  
SHAWN A. MCGUIRE, APPELLANT.  
837 N.W.2d 767

Filed August 23, 2013. No. S-12-279.

1. **Right to Counsel: Appeal and Error.** An appellate court reviews the trial court's decision on a motion to withdraw as counsel for an abuse of discretion.
2. **Prosecuting Attorneys: Conflict of Interest.** Whether an apparent conflict of interest justifies the disqualification of other members of a prosecuting office is a matter committed to the discretion of the trial court.
3. **Right to Counsel: Waiver: Appeal and Error.** When determining whether a defendant's waiver of his or her former attorney's conflict of interest was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
4. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2012), and the trial court's decision will not be reversed absent an abuse of discretion.
5. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
6. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.
7. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
8. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
9. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
10. **Right to Counsel: Waiver: Effectiveness of Counsel.** Appointed counsel must remain with an indigent accused unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.

11. **Attorneys at Law: Conflict of Interest.** Appointed counsel may be removed because of a potential conflict of interest, and such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel.
12. **Attorney and Client: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.
13. **Constitutional Law: Waiver.** Generally, for a waiver of a constitutional right to be valid, it must be made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.
14. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).
15. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
16. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
17. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. Rather, the determining factor is whether the record is sufficient to adequately review the question.
18. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
19. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her defense.
20. \_\_\_\_: \_\_\_\_\_. The two prongs of the ineffective assistance test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order.
21. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** An appellate court will not second-guess reasonable strategic decisions by counsel.
22. **Effectiveness of Counsel: Proof.** To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability

that but for counsel's deficient performance, the result of the proceeding would have been different.

23. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
24. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
25. **Homicide: Intent.** An intentional killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter.
26. **Jury Instructions: Proof: Appeal and Error.** The appellant has the burden to show that a questioned jury instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
27. **Trial: Courts: Homicide: Jury Instructions.** A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder. But a trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
28. **Homicide: Words and Phrases.** Sudden quarrel manslaughter requires sufficient provocation which causes a reasonable person to lose normal self-control.
29. **Homicide: Intent.** The question for sudden quarrel manslaughter is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.
30. \_\_\_\_: \_\_\_\_\_. The test for sudden quarrel manslaughter is an objective one.
31. **Aiding and Abetting.** Aiding and abetting is simply another basis for holding one liable for the underlying crime.
32. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed.
33. \_\_\_\_: \_\_\_\_\_. For aiding and abetting, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
34. **Criminal Law: Conspiracy.** A person is guilty of criminal conspiracy if the person intends to promote or facilitate the commission of a felony, agrees with one or more persons to commit that felony, and then the person, or a coconspirator, commits an overt act furthering the conspiracy.
35. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
36. \_\_\_\_\_. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Sarah M. Mooney, of Mooney Law Office, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

### I. NATURE OF CASE

After a jury trial, Shawn A. McGuire was found guilty of second degree murder under a theory of aiding and abetting, use of a deadly weapon to commit a felony, and criminal conspiracy to unlawfully possess and deliver a controlled substance. The convictions were based on McGuire's involvement with a cocaine exchange that resulted in the murder of informant Cesar Sanchez-Gonzalez (Sanchez) by Robert B. Nave. McGuire appeals the convictions and argues that he was prejudiced when the district court allowed his trial counsel to withdraw prior to trial and by accepting McGuire's waiver of the conflict of interest created by the former trial counsel's new employment with the Douglas County Attorney's office, which was prosecuting McGuire in this case. McGuire also argues the court impermissibly allowed evidence of prior bad acts and used improper jury instructions. In addition, McGuire argues that his trial counsel was ineffective for failing to request jury instructions regarding robbery and attempted robbery as lesser-included offenses of felony murder. Finally, McGuire argues that the district court erred in upholding the convictions without sufficient evidence and in imposing excessive sentences.

### II. BACKGROUND

Sanchez was an informant for the Greater Omaha Safe Streets Task Force. The task force also used Jorge Palacios as an informant. The task force is a joint operation involving the Federal Bureau of Investigation (FBI), the Omaha

Police Department, the Bellevue Police Department, the Nebraska State Patrol, and, at times, the Drug Enforcement Administration. The purpose of the task force is to pool federal and state resources in order to target Mexican drug trafficking organizations and violent street gangs.

In November 2009, Sanchez informed FBI Special Agent Gregory Beninato that a group of Mexican drug traffickers, including Abdul Vann, wanted to conduct a drug transaction in Kansas City, Missouri. A year after the Kansas City drug deal, Vann went to Sanchez' automotive repair shop (auto shop) in South Omaha, Nebraska, in an attempt to purchase cocaine. With this information, "Operation Sheepdog" was formed by the task force with the purpose of identifying the Mexican drug trafficking organization and Vann.

#### 1. EVENTS OF SEPTEMBER 28, 2010

On September 28, 2010, "Operation Sheepdog" was conducting surveillance on an expected drug deal involving Vann at Sanchez' auto shop. Beninato observed Vann approach and communicate with an African-American male passenger of a Chevrolet Impala with Indiana license plates, which was parked in a fast-food restaurant's parking lot near Sanchez' auto shop. Vann then went in the direction of Sanchez' auto shop and eventually returned to get into the driver's seat of the Impala.

Later, a white Chrysler Sebring, which was a rental car with Missouri plates, drove to and parked in the fast-food restaurant's parking lot. An African-American male, later identified as McGuire, exited the Sebring to talk to the passenger of the Impala. McGuire then proceeded to Sanchez' auto shop.

A Hispanic male, later identified as Cesar Ayala-Martinez, driving a GMC Yukon Denali, also arrived and entered the auto shop. Shortly thereafter, McGuire left the shop with Vann, and both got into the Sebring. Vann exited after driving in a circle, and McGuire left. McGuire later came back as the passenger in a black Ford Explorer and reentered Sanchez' auto shop.

Ayala-Martinez testified to the events that occurred in Sanchez' auto shop. Present for the drug exchange on September 28, 2010, were Ayala-Martinez, Sanchez, Vann, McGuire, and

possibly Palacios. Ayala-Martinez had agreed to sell Sanchez, the informant, 500 grams of powder cocaine in exchange for \$13,500. Ayala-Martinez handed the cocaine to Sanchez, who handed it to McGuire. McGuire opened the package and tasted the cocaine. Vann stated that “[i]t looks good,” and McGuire paid Sanchez, who paid Ayala-Martinez.

## 2. EVENTS OF OCTOBER 22, 2010

On October 22, 2010, the task force again set up surveillance at Sanchez’ auto shop for another proposed drug deal involving Vann. Prior to the deal, Sanchez and Ayala-Martinez agreed that Ayala-Martinez would sell Sanchez 1½ kilograms of powder cocaine in exchange for \$40,500. The task force members were briefed that they were conducting surveillance on Vann, McGuire, and Ayala-Martinez.

Richard Lutter, a narcotics investigator for the Nebraska State Patrol, was conducting surveillance on October 22, 2010, as a member of the task force for “Operation Sheepdog.” Lutter was exiting a parking lot near 24th and G Streets, where he observed McGuire standing next to a white Nissan. According to Lutter, McGuire was conversing with the passengers of the Nissan and was holding a black bag underneath his right arm. As Lutter drove past the vehicles, McGuire proceeded to a Sebring parked 20 yards behind the Nissan.

Beninato and FBI Special Agent Paris Capalupo were stationed in a parking lot with a direct view of Sanchez’ auto shop. At approximately 12:50 p.m., a white Chrysler Sebring pulled up and parked on the south side of the auto shop. McGuire exited the vehicle.

At around the same time, Vann and two unknown individuals, later identified as Kim Thomas and Nave, arrived at the auto shop. Beninato observed McGuire interact with both Thomas and Vann as he exited the Sebring. McGuire then proceeded in the direction of Sanchez’ auto shop. Sometime after McGuire entered the shop, Capalupo observed Nave put his hood over his head and pull a handgun from his waistband. Nave proceeded to enter Sanchez’ auto shop. Beninato testified that as Nave entered, McGuire almost instantaneously exited.

The events that occurred in the auto shop were not witnessed by any members of the task force. Ayala-Martinez testified that on October 22, 2010, he went to Sanchez' auto shop to sell 1½ kilograms of powder cocaine. When he arrived at the shop, Ayala-Martinez went into the office where Sanchez, Palacios, and Vann were waiting. McGuire arrived alone, approximately 20 minutes later. McGuire wanted Vann to test the cocaine by "cooking" the powder cocaine with baking soda and water. Vann and Palacios left the store to buy baking soda.

Shortly after Vann and Palacios exited the auto shop, McGuire told Sanchez that he was going to get some tea and left the office. Ayala-Martinez testified that within seconds of McGuire's exiting, Nave entered the office. According to Ayala-Martinez, Sanchez then pulled a revolver out of his desk drawer and was attempting to open the chamber while the gun was pointing down. Before Sanchez could raise his weapon, Nave shot Sanchez two or three times. Nave then pointed the gun at Ayala-Martinez and asked for the cocaine. Ayala-Martinez pointed to the cocaine, and Nave ran out with it. Sanchez later died due to the gunshot wounds.

After witnessing Nave enter the auto shop with the gun, Beninato and Capalupo proceeded in their vehicle toward the auto shop. Capalupo observed Nave run out the door of the auto shop and fire several shots at Palacios. Thomas ran from the back of the building and began firing at Palacios and Ayala-Martinez, who had exited the building.

At this time, McGuire was in the driver's seat of the Sebring. After firing shots, Thomas and Nave ran straight to the Sebring and got in the vehicle. McGuire then sped off at a high rate of speed down I Street. Beninato and Capalupo pursued the vehicle.

The Sebring crashed head on into a pickup truck near 20th and I Streets. McGuire immediately fled from the driver's seat. Thomas and Nave exited the vehicle and huddled near the driver's-side rear door. Thomas complied with orders to get on the ground, while Nave fled. On the driver's side of the Sebring, 10 live rounds of ammunition, head-stamped or marked "9mm CCI Luger," were found.

Thomas was handcuffed and taken into custody at the scene of the accident. A search of Thomas revealed a pair of black gloves. Nave was apprehended by Lutter, who had also pursued the Sebring to the crash scene. Capalupo and another officer arrested McGuire after a 3- to 5-minute pursuit. A search of McGuire revealed a roll of cash with \$20 and \$50 bills on the outside and regular paper on the inside of the roll, in an attempt to make the cash roll appear to contain a larger amount of cash. The search also revealed keys to the Sebring, an electronic ignition key for a Nissan, a black Kansas City hat, and \$3,858.

In the office area of Sanchez' auto shop, four Winchester 9-mm cartridge casings were found on the floor. No firearms were found in the office. A search of the white Nissan found a yellow sporting goods store bag on the passenger front seat containing a box of "CCI" ammunition, a pair of black gloves, and packaging material for black duct tape. Ten rounds were missing from the "CCI" ammunition box. Also found in the Nissan were three black head coverings.

Inside the Sebring, investigators found black duct tape consistent with the packaging found in the Nissan. A .357 Magnum pistol, a ".38 Special cartridge" revolver, a Smith & Wesson 9-mm pistol, and a .45-caliber Glock semiautomatic pistol were recovered from the Nissan. A firearms expert testified that the bullet recovered from Sanchez' body during the autopsy was fired from the 9-mm Smith & Wesson. Each of the four casings found in the auto shop were also from the 9-mm Smith & Wesson.

The Nissan was owned by Monique Pridgeon. Pridgeon testified that she was dating McGuire on October 22, 2010. Pridgeon testified that, while dating, she had witnessed McGuire talk to Vann in Omaha and had witnessed McGuire talk to Thomas in Kansas City.

On October 22, 2010, Pridgeon allowed McGuire to borrow her car. The previous night, Pridgeon had gone to a sporting goods store to purchase bullets for the shooting range. She also purchased a little blue bag to hold change. When she returned home, she placed the blue bag on her dresser and put the bullets, which were in a yellow bag, in her garage. When

she purchased the bullets, the box was sealed and she had not removed any bullets before or after placing the ammunition in the garage.

Pridgeon did not realize her bag and box of ammunition were missing until after she was questioned by investigators. She testified that although she thought the bag was blue—the bag found on McGuire was black—the fanny pack found on McGuire appeared to be similar to the bag she purchased. Pridgeon testified that only she, her mother, and McGuire had keys to her garage.

The State charged McGuire with the first degree murder of Sanchez, alleging two theories of the crime: felony murder and premeditated murder. It also charged him with use of a deadly weapon to commit a felony and criminal conspiracy to unlawfully possess and distribute a controlled substance.

### 3. APPOINTED COUNSEL'S MOTION TO WITHDRAW

At a hearing on September 20, 2011, McGuire's trial counsel, Chad Brown, filed a motion to withdraw as counsel for McGuire. Brown explained that he sought to withdraw from the case because he had accepted a position with the Douglas County Attorney's office in the felony division. He was terminating his private practice and felt it was necessary to withdraw because of the conflict of interest. The court asked McGuire if he understood, and the following exchange occurred:

THE COURT: All right. Have you had an opportunity to discuss this with your attorney . . . ?

[McGuire]: Yes.

THE COURT: How do you feel about this?

[McGuire]: Kind of confused a little bit.

THE COURT: Yeah. You understand that [Chad] Brown is asking to withdraw because he's terminating his private practice, regardless of whether he was rejoining the Douglas County Attorney's Office or not? So do you object that I let him out, release him from further representation duties to you?

[McGuire]: I mean —

THE COURT: I didn't hear you. You understand, if . . . Brown withdraws, I'm going to appoint [Daniel] Stockmann, okay?

[McGuire]: He's fine (indicating).

THE COURT: . . . Stockmann's fine with you?

[McGuire]: Yes.

The district court allowed Brown to withdraw and appointed Daniel Stockmann as trial counsel.

#### 4. MOTION TO DISQUALIFY PROSECUTOR'S OFFICE

After being appointed, Stockmann believed that McGuire should file a motion to disqualify the Douglas County Attorney's office in light of Brown's employment with the office. In November 2011, Stockmann filed a motion to withdraw and a hearing was held. Stockmann told the district court that he advised McGuire to file the motion but that McGuire refused to do so. The district court denied the motion and stated:

THE COURT: So they don't feel there's an issue here, the State does not. . . . Stockmann, I think, is just — in zealously representing your interest, has advised you that that's an issue you should pursue. Now it's my understanding you've advised him you do not wish for him to pursue that strategy and, if he persists in pursuing that strategy, I'm not — asking — you want a new attorney appointed; is that correct?

[McGuire]: Yes, sir.

THE COURT: All right. So, to the extent there's any potential conflict here —

And, again, you feel you've been able to fully discuss this with . . . Stockmann? I'm not asking you to tell me what you discussed but — the specifics, but you feel that you've been able to discuss this issue with . . . Stockmann to the fullest extent, that you feel like he's answered all of your questions regard[ing] this potential conflict and, to the extent that there is any potential conflict, you waive your opportunity or right to pursue that potential conflict issue; is that correct?

[McGuire]: Yes, sir.

THE COURT: All right. Therefore, . . . Stockmann, your motion to withdraw is — under the circumstances, I'll — you've been told by your client he does not want you to pursue this, so the issue you raised in your motion to withdraw is fairly moot, wouldn't you think?

The district court went on to find that McGuire “has waived any potential conflict [and] is doing that knowingly, willingly, intelligently and voluntarily.”

#### 5. PRETRIAL AND TRIAL

Before trial, the State filed a motion in limine and notice of intent to use Neb. Evid. R. 404(2)<sup>1</sup> evidence. The State requested authorization to adduce evidence of the drug deal that had occurred on September 28, 2010, involving McGuire and Ayala-Martinez at Sanchez' auto shop. The evidence was to be used for the limited purposes of showing McGuire's motive, intent, and knowledge. Following a hearing, the district court found by clear and convincing evidence that the State had proved McGuire's involvement in the September 28 drug deal. It concluded that the evidence was admissible to prove McGuire's knowledge that a substantial amount of cocaine would change hands during the October 22 transaction and to prove McGuire's motive and intent to commit a robbery on that date. The court reasoned that McGuire's motive and intent to commit the robbery was key to the State's felony murder charge.

At the jury instruction conference, McGuire offered a proposed jury instruction to replace jury instruction No. 5, which concerned the elements of second degree murder. The proposed instruction included the element “not upon a sudden quarrel.” Jury instruction No. 5, as given to the jury, used only the sudden quarrel language under “Section III” when describing the elements of manslaughter. The proposed addition of “not upon a sudden quarrel” to the elements of second degree murder was denied by the district court.

After a 10-day jury trial, McGuire was convicted of second degree murder, use of a deadly weapon to commit a felony,

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<sup>1</sup> Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012).

and criminal conspiracy to unlawfully possess and deliver a controlled substance. The district court sentenced McGuire to consecutive terms of imprisonment of 40 to 60 years for the conviction of second degree murder, 25 years for the conviction of use of a deadly weapon to commit a felony, and 40 years for the conviction of criminal conspiracy.

### III. ASSIGNMENTS OF ERROR

McGuire assigns as error, restated and summarized: (1) the district court's allowing Brown to withdraw, (2) the district court's allowing McGuire to waive the conflict of interest, (3) the district court's admission of the September 28, 2010, events as prior bad acts, (4) ineffective assistance of trial counsel, (5) the district court's not using McGuire's proposed manslaughter instruction, (6) the district court's finding sufficient evidence to support all three convictions, and (7) the district court's abuse of discretion by imposing excessive sentences.

### IV. STANDARD OF REVIEW

[1-3] We review the trial court's decision on a motion to withdraw as counsel for an abuse of discretion.<sup>2</sup> Likewise, whether an apparent conflict of interest justifies the disqualification of other members of a prosecuting office is a matter committed to the discretion of the trial court.<sup>3</sup> However, when determining whether a defendant's waiver was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.<sup>4</sup>

[4] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403<sup>5</sup> and rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.<sup>6</sup>

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<sup>2</sup> See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

<sup>3</sup> See *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

<sup>4</sup> See *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

<sup>5</sup> Neb. Rev. Stat. § 27-403 (Reissue 2008).

<sup>6</sup> *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012).

[5] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.<sup>7</sup>

[6] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.<sup>8</sup>

[7] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.<sup>9</sup>

[8] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.<sup>10</sup>

[9] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.<sup>11</sup>

## V. ANALYSIS

### 1. MOTION TO WITHDRAW AND WAIVER OF CONFLICT OF INTEREST

McGuire's first attorney, Brown, moved to withdraw because he had been hired by the office prosecuting McGuire.

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<sup>7</sup> *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

<sup>8</sup> *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

<sup>9</sup> *State v. Reinpold*, 284 Neb. 950, 824 N.W.2d 713 (2013).

<sup>10</sup> *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

<sup>11</sup> *In re Interest of Samantha L. & Jasmine L.*, 284 Neb. 856, 824 N.W.2d 691 (2012).

After granting the motion, the district court appointed Stockmann to represent McGuire. As his newly appointed attorney, Stockmann advised McGuire to file a motion requesting the district court to recuse the prosecuting office from the case. Stockmann advised McGuire that Brown's employment with the prosecuting office could have an adverse effect on McGuire's ability to receive a fair trial. Despite his attorney's advice, McGuire refused to file such a motion. Based on McGuire's refusal, the district court held that McGuire had waived the issue and allowed the prosecuting office to continue with the trial.

McGuire now argues that the district court erred in two ways in its handling of this situation. First, McGuire argues that the district erred in allowing Brown to end his representation of McGuire. Second, McGuire argues that the district court erred by accepting McGuire's waiver of the conflict of interest and by not disqualifying the prosecuting office.

(a) Motion to Withdraw

McGuire argues that the district court committed reversible error in granting Brown's motion to withdraw. McGuire alleges the withdrawal prejudiced him, because the newly appointed trial counsel had very little time to prepare for trial and had to do so without access to prior counsel to help expedite the trial preparations. We disagree and hold that the district court did not abuse its discretion in granting Brown's motion to withdraw.

[10] Brown was appointed to represent McGuire, who was deemed indigent. We have held that appointed counsel must remain with an indigent accused unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.<sup>12</sup> The State concedes, and the record reflects, that McGuire did not choose to proceed pro se or with private counsel. Rather, the State argues that

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<sup>12</sup> See *State v. Molina*, *supra* note 2.

the district court did not abuse its discretion, because Brown became “incompetent” by way of his new employment with the Douglas County Attorney’s office, which was the office prosecuting McGuire.

[11,12] We have held that appointed counsel may be removed because of a potential conflict of interest and that such a conflict could, in effect, render a defendant’s counsel incompetent to represent the defendant and warrant appointment of new counsel.<sup>13</sup> The phrase “conflict of interest” denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer’s representation of one client is rendered less effective by reason of his or her representation of another client.<sup>14</sup>

Here, Brown’s new employment did create a conflict of interest. He was ending his private practice and joining the Douglas County Attorney’s felony division, which was prosecuting McGuire. He could not maintain his representation of McGuire while being employed by the prosecution.

McGuire argues that the conflict only came to be once the court allowed Brown to withdraw. In other words, if the district court did not grant his withdrawal, Brown would be unable to begin employment with the Douglas County Attorney’s office.

We disagree. Such an action would not have prevented a conflict of interest, because Brown told the court that he was terminating his private practice. Forcing Brown to represent McGuire would have created a different conflict of interest, because it would have prevented Brown from seeking alternative employment. We refuse to set a rigid rule of law that prevents an attorney from changing employment without first seeing all of his or her clients’ cases to the end. The decision on a motion to withdraw should remain at the discretion of the trial court.

We find that Brown was incompetent to represent McGuire due to his new employment. Further, we find that McGuire has

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<sup>13</sup> *Id.*

<sup>14</sup> See *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994).

failed to provide specific evidence of how he was prejudiced by Brown's withdrawal. Therefore, we hold that the trial court did not abuse its discretion in allowing Brown to withdraw as McGuire's trial counsel.

(b) Waiver of Conflict  
of Interest

McGuire argues that the district court erred when it allowed McGuire to waive the alleged conflict of interest created by Brown's new employment with the prosecuting office. McGuire makes two arguments. First, McGuire argues that it should be an absolute requirement that the court immediately disqualify the prosecuting office in situations where a prosecutor in the office previously represented the defendant. Second, McGuire argues that the district court erred in accepting his waiver, because he did not properly understand why Brown had withdrawn from his case and thus, did not understand why requesting recusal was important. We reject both arguments.

First, in *State v. Kinkennon*,<sup>15</sup> we rejected a per se rule of requiring disqualification of a prosecuting office when a conflict of interest with a defendant arises. We held that the ultimate goal of maintaining both public and individual confidence in the integrity of our judicial system can be served without resorting to such a broad and inflexible rule.<sup>16</sup> A per se rule would unnecessarily limit mobility in the legal profession and inhibit the ability of prosecuting attorney's offices to hire the best possible employees because of the potential for absolute disqualification in certain instances.<sup>17</sup> In his brief, McGuire does not challenge this reasoning, and we find no reason to reevaluate our precedent.

Second, we find that under these unique circumstances, McGuire has voluntarily, knowingly, and intelligently waived the alleged conflict of interest created by Brown's employment

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<sup>15</sup> *State v. Kinkennon*, *supra* note 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

with the prosecuting office. Our research finds it to be exceedingly rare for a defendant to waive a conflict of interest that could result in disqualifying the prosecutor's office. However, our precedent does establish that a defendant can waive a right to assistance of an attorney unhindered by a conflict of interest,<sup>18</sup> and under Neb. Rev. Stat. § 24-739 (Reissue 2008), parties can consent to waiving a judicial disqualification. Because recusal is not a per se rule in this instance, we hold that a defendant can waive a conflict of interest that would disqualify the prosecuting office.

[13] Generally, for a waiver of a constitutional right to be valid, it must be made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.<sup>19</sup> A waiver is permissible provided a defendant "'knows what he is doing and his choice is made with eyes open.'"<sup>20</sup>

Here, the unique facts demonstrate that McGuire voluntarily, knowingly, and intelligently waived the possible disqualification of the prosecuting office. McGuire's second attorney, Stockmann, fully informed him of the relevant circumstances and likely consequences of waiving the disqualification. In fact, Stockmann was so concerned about McGuire's decision to not file the motion to recuse that he sought the court's permission to withdraw from the case for that reason.

Additionally, the record demonstrates that during Stockmann's hearing to withdraw, the district court fully discussed the disqualification issue with McGuire. McGuire then affirmatively waived his right to pursue the issue. Based on McGuire's statements in court, the district court found that McGuire voluntarily, knowingly, and intelligently waived the issue of disqualification. There is no evidence to demonstrate otherwise, and therefore, the district court's decision to accept the waiver was not clearly erroneous.

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<sup>18</sup> See *id.*

<sup>19</sup> See *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

<sup>20</sup> *Id.* at 137, 354 N.W.2d at 625 (quoting *Adams v. U. S. ex rel. McCann*, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1942)).

2. RULE 404(2) EVIDENCE—EVENTS OF  
SEPTEMBER 28, 2010

McGuire argues the district court erred in admitting the events of September 28, 2010, as rule 404(2)<sup>21</sup> evidence. McGuire argues that the evidence was offered to show a propensity to commit the charged crime and that it was substantially outweighed by its potential for unfair prejudice. We disagree, because the events of September 28 establish McGuire's motive, intent, and knowledge to commit the robbery on October 22.

[14-16] Rule 404(2) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.<sup>22</sup> But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).<sup>23</sup> Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.<sup>24</sup> An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to

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<sup>21</sup> § 27-404(2).

<sup>22</sup> *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), cert. denied \_\_\_\_ U.S. \_\_\_\_, 133 S. Ct. 244, 184 L. Ed. 2d 129.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

consider the evidence only for the limited purpose for which it was admitted.<sup>25</sup>

Prior to trial, the State filed a motion in limine and notice of intent to use the evidence of the September 28, 2010, drug deal as rule 404(2) evidence. A hearing was held. At the hearing, the State argued that under our holding in *State v. Collins*,<sup>26</sup> the admission of the evidence was proper for the purposes of showing motive, intent, and knowledge. As noted, the district court admitted the evidence for the purposes of proving McGuire's motive, intent, and knowledge to commit a robbery on October 22.

In *Collins*, we affirmed the admission of evidence under rule 404(2) that the defendant had organized and previously participated in drug deals with the two victims in the defendant's trial for first degree murder and attempted first degree murder.<sup>27</sup> We determined that the evidence was admissible to show the defendant's motive, intent, and knowledge to rob the victims during the charged crimes. The previous transactions showed the defendant's knowledge that the victims would have significant amounts of cocaine with them and where they would keep it.<sup>28</sup> Because of this knowledge, a juror could have reasonably inferred that the defendant wanted the cocaine for himself because he understood that he would gain more profit without sharing the proceeds of subsequent drug sales with the victims. This profit was his motive to rob both men and showed his intent to do so.<sup>29</sup> "And this robbery is, of course, key to the State's felony murder theory—that [the defendant] was guilty of first degree murder because [a victim] was killed during the commission of the robbery."<sup>30</sup>

The same reasoning applies here. McGuire's involvement in the September 28, 2010, drug deal was relevant to show

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<sup>25</sup> *Id.*

<sup>26</sup> *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 944, 799 N.W.2d at 708.

that he knew there would be a large amount of cocaine in Sanchez' auto shop on October 22 and knew how the drug transaction would take place. A juror could reasonably infer that this knowledge gave McGuire a profit motive to rob Sanchez. And a defendant's motivation may support an inference that the defendant intended to commit the act that would accomplish the goal implied by his motivation—especially when the State proves that the defendant participated in a plan to commit the act.<sup>31</sup>

When the underlying felony for a felony murder charge is a robbery, the intent that the State must prove is the intent to commit the robbery, not the intent to kill.<sup>32</sup> So as in *Collins*, McGuire's intent to rob Sanchez was key to the State's felony murder theory. It is true that McGuire did not personally shoot Sanchez. But the State claimed that McGuire aided and abetted a robbery which resulted in the robbery victim's death. And under an aiding and abetting theory of felony murder premised on an underlying robbery, even if a coparticipant in the robbery caused the victim's death, the defendant aider and abettor can be convicted of felony murder if the State proves the defendant intended to rob the victim.<sup>33</sup> Therefore, the district court did not err in allowing the events of September 28, 2010, to be elicited at trial. Under rule 404(2), the testimony was independently relevant to demonstrate McGuire's motive, intent, and knowledge to rob Sanchez.

### 3. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

McGuire argues that his trial counsel should have requested jury instructions for the crimes of attempted robbery and robbery, allowing the jury to consider convicting McGuire of robbery or attempted robbery as opposed to first degree murder, second degree murder, or manslaughter. He further argues that

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<sup>31</sup> See, *State v. Collins*, *supra* note 26; 22A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5240 (2012).

<sup>32</sup> See, *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013) (citing *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996)).

<sup>33</sup> See *id.*

“[t]he evidence produced a rational basis for acquitting . . . McGuire of felony murder and convicting him of robbery or attempted robbery, and therefore trial counsel’s performance was deficient when he did not propose the trial court use robbery or attempted robbery jury instructions as lesser included offenses.”<sup>34</sup> We reject this claim because McGuire failed to sufficiently plead that he was actually prejudiced by his trial counsel’s failure to request the proposed instructions.

[17,18] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.<sup>35</sup> Rather, the determining factor is whether the record is sufficient to adequately review the question.<sup>36</sup> An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.<sup>37</sup>

[19-21] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,<sup>38</sup> the defendant must first show that counsel’s performance was deficient and second, that this deficient performance actually prejudiced his or her defense.<sup>39</sup> The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.<sup>40</sup> An appellate court will not second-guess reasonable strategic decisions by counsel.<sup>41</sup> In this case, there was not an evidentiary hearing and therefore, we have no evidence concerning trial counsel’s strategy.

[22,23] We can, however, address whether McGuire was prejudiced from his trial counsel’s alleged error. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel’s deficient performance, the result

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<sup>34</sup> Brief for appellant at 37.

<sup>35</sup> *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>39</sup> *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

of the proceeding would have been different.<sup>42</sup> A reasonable probability is a probability sufficient to undermine confidence in the outcome.<sup>43</sup>

The alleged error could not have prejudiced McGuire. The jury did not convict McGuire of felony murder. Therefore, McGuire's argument, as stated in his brief, does not demonstrate actual prejudice because the error did not result in him *actually* being convicted of felony murder. His trial counsel's error was harmless.

Not only was the "error" harmless, the "error" was likely beneficial. If the jury was instructed on the crimes of robbery and attempted robbery, which the evidence in this case does support, the only change in outcome that could have occurred is McGuire's being convicted of felony murder. Had McGuire been convicted of robbery, for instance, the evidence supports that during the commission of that crime, Sanchez was shot and killed. Under our felony murder statute, McGuire could have been convicted of first degree felony murder for the death of Sanchez during the robbery.<sup>44</sup> Instead, he was convicted of second degree murder under an aiding and abetting theory. McGuire does not present an argument of how instructing on robbery or attempted robbery would have resulted in an acquittal of McGuire on the second degree murder charge.

Therefore, from our review of the record, trial counsel's alleged ineffectiveness did not prejudice McGuire. This assignment of error is without merit.

#### 4. PROPOSED MANSLAUGHTER INSTRUCTION

McGuire argues that the district court erred in denying his proposed jury instruction for second degree murder. McGuire wanted to add "not upon a sudden quarrel" to the language of the second degree murder instruction. He relies on *State v.*

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See, Neb. Rev. Stat. § 28-303 (Reissue 2008); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), *modified on denial of rehearing* 261 Neb. 623, 633 N.W.2d 890.

*Smith*<sup>45</sup> for his argument that the failure to include the sudden quarrel language resulted in an instruction that did not require the jury to consider voluntary and involuntary manslaughter. We agree that the instruction was in error but find that the error did not result in prejudice.

[24] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.<sup>46</sup>

[25] In *Smith*,<sup>47</sup> we held that an intentional killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter. After a lengthy discussion on what constitutes manslaughter, we explained:

Because of our holding today, the step instruction given in this case was not a correct statement of the law. Specifically, the step instruction required the jury to convict on second degree murder if it found that [the defendant] killed [the victim] intentionally, but it did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.<sup>48</sup>

A review of the instructions given to the jury in this case demonstrates a similar incorrect statement of law. In the relevant parts, the jury was instructed as follows:

#### SECTION II

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [McGuire] of the crime of murder in the second degree are:

1. That [McGuire], on or about October 22, [2]010, did kill Cesar Sanchez-Gonzalez;

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<sup>45</sup> *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

<sup>46</sup> *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

<sup>47</sup> *State v. Smith*, *supra* note 45.

<sup>48</sup> *Id.* at 734, 806 N.W.2d at 394.

2. That he did so in Douglas County, Nebraska; and
3. That [McGuire] did so intentionally, but without premeditation.

### SECTION III

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [McGuire] of the crime of manslaughter are:

1. That [McGuire], on or about October 22, 2010, did kill Cesar Sanchez-Gonzalez;
2. That he did so in Douglas County, Nebraska; and
3. That he did so without malice, either:
  - a. Intentionally upon a sudden quarrel, or
  - b. Unintentionally while in the commission of an unlawful act.

### EFFECT OF FINDINGS

You must separately consider in the following order the crimes of murder in the first degree, murder in the second degree, and manslaughter.

For the crime of murder in the first degree, you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find [McGuire] guilty of murder in the first degree and stop.

If, however, you find that the state did not so prove, then you must proceed to consider the crimes of murder in the second degree and manslaughter until you find [McGuire] guilty of one of the crimes or find him not guilty of all of them.

The error in these instructions is similar to the error outlined in *Smith*. If the jury finds beyond a reasonable doubt that McGuire aided and abetted the intentional killing of Sanchez without premeditation, the jury is instructed to stop and not review the elements of other homicide offenses, including manslaughter. Thus, the jury would never consider whether Nave killed Sanchez upon a “sudden quarrel,” which would have reduced McGuire’s conviction to manslaughter. Jury instruction No. 5 was an incorrect statement of law.

[26] However, in order for us to reverse on a jury instruction, the evidence must support the inclusion of “upon a

sudden quarrel” and the defendant must have been prejudiced by the exclusion of that language.<sup>49</sup> The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.<sup>50</sup>

[27] A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.<sup>51</sup> But a trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.<sup>52</sup> In the context of this case, McGuire was prejudiced by the erroneous jury instruction only if the jury could have reasonably concluded on the evidence presented that his intent to kill was the result of a sudden quarrel.

[28-30] Sudden quarrel manslaughter requires sufficient provocation which causes a reasonable person to lose normal self-control.<sup>53</sup> The question is whether there existed reasonable and adequate provocation to excite one’s passion and obscure and disturb one’s power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.<sup>54</sup> The test is an objective one.<sup>55</sup>

McGuire fails to explain in his appellate brief how the jury could have reasonably concluded that Sanchez was killed during a sudden quarrel. The evidence shows that before entering the auto shop, Nave cinched up his hood over his head, removed a loaded gun from his waistband, and proceeded to enter the shop. According to Ayala-Martinez, Nave shot Sanchez upon entering the office, stating that “he came in, and he already had the weapon in his two hands, and he just

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<sup>49</sup> See *State v. Freemont*, *supra* note 46.

<sup>50</sup> See *State v. Smith*, *supra* note 45.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

looked at him and fired.” There was no scuffle or altercation, and no words were exchanged. When Nave entered, Sanchez was holding an unloaded revolver, but the revolver was pointing down. There is no evidence that Nave saw Sanchez holding the revolver. In fact, it should be noted that the gun allegedly held by Sanchez was not found by investigators. Further, outside surveillance confirms that Nave was in and out of the auto shop quickly.

We conclude that there is no evidence in this record upon which the jury could have concluded that Nave was provoked, lost the power of reasoning, and acted rashly without due deliberation. Nave’s actions outside of the auto shop of cinching his hood and pulling the gun, when considered with the fact that he immediately shot Sanchez upon entering the office, demonstrate that Nave intended to shoot Sanchez before any alleged provocation. There is no evidence in this record upon which the jury could have concluded that McGuire (through the aiding and abetting instruction) committed sudden quarrel manslaughter instead of second degree murder. We therefore conclude that the improper jury instruction was not warranted by the evidence and did not prejudice McGuire. This jury instruction error does not require the reversal of his second degree murder conviction.

## 5. SUFFICIENCY OF EVIDENCE

McGuire argues that the evidence was insufficient to support his convictions for second degree murder, criminal conspiracy to unlawfully possess and distribute a controlled substance, and use of a deadly weapon to commit a felony. McGuire argues, summarized, that there was insufficient evidence establishing that he was a conspirator to the crimes and insufficient evidence to establish that he aided and abetted. Because there was considerable evidence demonstrating cooperation between McGuire and Nave, Thomas, and Vann, there is sufficient evidence in the record to support the convictions.

McGuire was convicted of second degree murder and use of a deadly weapon to commit a felony under an aiding and abetting theory. Under Neb. Rev. Stat. § 28-304(1) (Reissue 2008),

“[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.” Further, under Neb. Rev. Stat. § 28-1205(1)(a) (Cum. Supp. 2012), “[a]ny person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state commits the offense of use of a deadly weapon to commit a felony.” It is undisputed that McGuire was not the shooter.

[31-33] However, under Neb. Rev. Stat. § 28-206 (Reissue 2008), “[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he [or she] were the principal offender.” We have stated that aiding and abetting is simply another basis for holding one liable for the underlying crime.<sup>56</sup> By its terms, § 28-206 provides that a person who aids or abets may be prosecuted and punished as if he or she were the principal offender. We have stated that aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed.<sup>57</sup> No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.<sup>58</sup> Mere encouragement or assistance is sufficient.<sup>59</sup>

A rational jury could conclude beyond a reasonable doubt that McGuire intended to aid and abet the crime committed by Nave. Before the theft of the cocaine and the shooting, law enforcement surveillance described three individuals—McGuire, Nave, and Thomas—as being in proximity to each other and the Sebring immediately before the crime. While inside the auto shop, McGuire had a roll of cash filled with paper to make it appear like he had substantially more money. This indicates that McGuire never had intentions of buying the cocaine. When McGuire exited the shop, Nave instantaneously entered the shop with his gun drawn.

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<sup>56</sup> See *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Furthermore, the fact that Nave entered the auto shop specifically demanding drugs indicates that he was working with McGuire and Vann. Only McGuire and Vann had purchased drugs from Sanchez through Ayala-Martinez before. There is no evidence that Nave was involved in the prior deal. Therefore, the only logical way for Nave to know there was going to be a large amount of drugs in the auto shop was by being told by McGuire and Vann.

After Nave committed the murder and robbery, he fled with Thomas in the Sebring, driven by McGuire. Subsequent to his arrest, it was determined a box of 9-mm bullets had been taken from McGuire's girlfriend's garage. The box of 9-mm bullets, head-stamped "CCI," was found in the front seat of the Nissan; however, 10 rounds were missing. This was the same Nissan that Lutter had seen McGuire standing next to prior to the robbery. In fact, when McGuire was arrested, he had an electronic ignition key for a Nissan.

Investigators found 10 live 9-mm rounds, head-stamped "CCI," next to the Sebring where Nave had been standing. Nave was attempting to load a gun with the 9-mm rounds following the crash. In the Sebring, investigators found black duct tape that was consistent with the packaging in the Nissan. The evidence overwhelmingly supports that the Nissan and Sebring were intended to be used together in the crime. The evidence also overwhelmingly supports the jury's likely conclusion that McGuire provided Nave with 9-mm bullets, head-stamped "CCI."

Therefore, a rational jury could conclude that McGuire aided and abetted Nave in the murder of Sanchez (which involved a handgun) by providing information on the drug deal, providing a getaway car, and providing bullets. As such, the evidence is sufficient to uphold McGuire's convictions for second degree murder and use of a deadly weapon to commit a felony.

[34] McGuire also unsuccessfully argues that his conviction for criminal conspiracy to unlawfully possess and distribute a controlled substance is not supported by the evidence. A person is guilty of criminal conspiracy if the person intends to promote or facilitate the commission of

a felony, agrees with one or more persons to commit that felony, and then the person, or a coconspirator, commits an overt act furthering the conspiracy.<sup>60</sup> The State claimed that McGuire conspired to possess and then distribute cocaine. In relevant part, Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2010) makes it unlawful “for any person knowingly or intentionally . . . [t]o manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance.” Cocaine is a controlled substance.<sup>61</sup> So we must affirm McGuire’s conviction where there is evidence from which a rational jury could find beyond a reasonable doubt that he intended to promote or facilitate the crime of possession with intent to distribute cocaine, that he agreed with others to commit that crime, and that he or another coconspirator committed an overt act in furtherance of the conspiracy.

The evidence supports that McGuire conspired with Vann, Thomas, and Nave to acquire possession of cocaine with intent to distribute it. All of the evidence supporting McGuire’s aiding and abetting Vann also applies here. Ayala-Martinez testified that McGuire wanted to test the 1½ kilograms of powder cocaine before purchasing. It was McGuire who had the roll of cash to “purchase” the cocaine. It was McGuire who aided and abetted Nave in the murder of Sanchez for the cocaine. And the cocaine was found in the Sebring driven by McGuire after he had crashed the vehicle. From these facts, a rational jury could conclude that McGuire conspired to possess cocaine with the three other men.

#### 6. EXCESSIVE SENTENCES

McGuire argues that his sentences were plainly unjust due to his minimal criminal record and because he was less “culpable” than Nave, who received a substantially similar

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<sup>60</sup> See, Neb. Rev. Stat. § 28-202 (Reissue 2008); *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013).

<sup>61</sup> See Neb. Rev. Stat. § 28-405(a)(4) [Schedule II] (Cum. Supp. 2010) and § 28-416(7) and (8).

sentence. McGuire was sentenced to terms of imprisonment of 40 to 60 years for the conviction of second degree murder, 25 years for the conviction of use of a deadly weapon to commit a felony, and 40 years for the conviction of criminal conspiracy. All of the sentences were to be served consecutively to each other. McGuire concedes that his sentences are within the statutory range. Accordingly, we review the sentences for an abuse of discretion.<sup>62</sup>

[35,36] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.<sup>63</sup> The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.<sup>64</sup>

Beyond having a minimal criminal record and arguing he was less culpable than Nave, McGuire gives few reasons why his sentences were excessive. However, this was a serious crime of violence. McGuire aided and abetted in the cold-blooded murder of Sanchez. Additionally, according to the presentence investigation, McGuire has failed to take responsibility for his involvement in the events of October 22, 2010. Further, McGuire scored in the high-risk level to reoffend on an assessment test.

In light of these considerations noted by the sentencing court and the State, we conclude that McGuire has not shown that the sentencing court abused its discretion with respect to the amount of incarceration imposed for each conviction. We reject McGuire's argument that the court imposed excessive sentences.

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<sup>62</sup> *State v. Pereira*, *supra* note 10.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

## VI. CONCLUSION

For the reasons discussed, we affirm McGuire's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., and CASSEL, J., not participating.

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STATE OF NEBRASKA, APPELLEE, v.  
TODD S. BAKER, APPELLANT.  
837 N.W.2d 91

Filed August 30, 2013. Nos. S-12-1180, S-12-1181.

1. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
2. **Postconviction: Constitutional Law.** A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.
3. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
4. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
5. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
6. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
7. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
8. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance

actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.

9. **Effectiveness of Counsel: Appeal and Error.** In addressing the "prejudice" component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
10. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
11. **Effectiveness of Counsel: Mental Competency: Proof.** In order to demonstrate prejudice from counsel's failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.

Appeals from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Todd S. Baker, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

### NATURE OF CASE

In each of these two cases, Todd S. Baker appeals the order of the district court for Lancaster County which denied his motion for postconviction relief without an evidentiary hearing. Baker, acting pro se, sought relief with respect to two separate convictions for first degree murder, for which he was serving consecutive life sentences. Because Baker failed to allege facts that show he was entitled to relief and the record refutes his claims, we affirm the denials of his motions.

### STATEMENT OF FACTS

In 2006, Baker was found by a jury to be guilty of first degree murder; he was sentenced to life imprisonment. A

notice of appeal was filed, but Baker later withdrew the appeal. In 2007, Baker pled guilty to a separate charge of first degree murder; he was sentenced to serve a life sentence consecutive to the life sentence in his first conviction.

In case No. S-12-1180, Baker filed a pro se motion for postconviction relief with respect to his 2006 murder conviction. He claimed that he received ineffective assistance of counsel, in that counsel (1) failed to appeal the overruling of his plea in abatement, (2) allowed him to waive his right to a speedy trial, (3) failed to request a mental evaluation, and (4) allowed him to withdraw his appeal. He also generally claimed that counsel was ineffective with respect to a motion to recuse the trial judge. He further claimed that there was prosecutorial misconduct because the prosecution did not call to the court's attention that he was mentally incompetent to stand trial. He finally claimed that the court erred when it failed to order a competency evaluation.

In case No. S-12-1180, the court sustained the State's motion to deny an evidentiary hearing and dismissed Baker's motion for postconviction relief. The court concluded with respect to Baker's assertions of ineffective assistance of counsel that (1) with respect to the motion to recuse, Baker made a mere allegation of ineffective assistance without a showing that counsel's performance was deficient or that Baker was prejudiced; (2) the overruling of a plea in abatement is not appealable and that therefore, the fact that counsel did not attempt to appeal the order was not deficient performance; and (3) the record showed the trial court thoroughly inquired into Baker's decision to waive his speedy trial rights and that Baker made no showing that counsel's performance was deficient or that he was prejudiced. With regard to Baker's claims that counsel, the prosecution, and the trial court violated his rights by failing to deal with the issue of his competency, the postconviction court noted that Baker's claim was simply that he was too medicated to be competent. The postconviction court noted that medication is often necessary to treat a defendant's mental ailments and does not necessarily render the defendant incompetent. The postconviction court noted

that the trial court had ample opportunity to observe Baker over the course of the proceedings and that the record demonstrated Baker had the capacity to understand the nature and object of the proceedings against him and could make a rational defense.

In case No. S-12-1181, Baker filed a *pro se* motion for postconviction relief with respect to his 2007 murder conviction. He claimed that he received ineffective assistance of counsel, in that counsel (1) allowed his right to a speedy trial to be violated and (2) failed to request a mental evaluation. He further claimed that there was prosecutorial misconduct because the prosecution did not call to the court's attention that Baker was mentally incompetent to stand trial. He finally claimed that the court erred when it failed to order a competency evaluation.

In case No. S-12-1181, the court sustained the State's motion to deny an evidentiary hearing and dismissed Baker's motion for postconviction relief. The court noted that there was no violation of Baker's speedy trial rights, because the record showed that he was arraigned, pled guilty, and was sentenced all in one hearing. The court concluded, therefore, that there was no ineffective assistance of counsel with respect to speedy trial rights. With regard to Baker's claims that counsel, the prosecution, and the trial court violated his rights by failing to deal with the issue of his competency, the postconviction court noted that, as in case No. S-12-1180, Baker's claim was simply that he was too medicated to be competent. The postconviction court similarly noted that the record showed the trial court thoroughly questioned Baker before accepting his plea, that his answers were appropriate, and that there was nothing that should have caused counsel or the court to doubt Baker's competence.

Baker appeals the denials of his motions for postconviction relief without evidentiary hearings in each of these two cases.

#### ASSIGNMENT OF ERROR

In each case, Baker claims, restated, that the district court erred when it denied his motion for postconviction relief without an evidentiary hearing.

### STANDARD OF REVIEW

[1-3] In appeals from postconviction proceedings, we independently resolve questions of law. *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012). A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief. *Id.* Thus, in appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012); *State v. Edwards*, *supra*.

### ANALYSIS

Baker claims in each appeal that the district court erred when it denied postconviction relief without conducting an evidentiary hearing. We find no merit to Baker's assignment of error in either appeal.

[4] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010); *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009). Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

[5,6] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or

federal Constitution. *State v. Watkins*, *supra*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id.*

[7,8] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. See *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013). To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Robinson*, *supra*. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id.*

[9,10] In addressing the "prejudice" component of the *Strickland* test, an appellate court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *State v. Robinson*, *supra*. To show prejudice under the prejudice component of the *Strickland* test, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Robinson*, *supra*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

We note that in case No. S-12-1180, a notice of appeal from the underlying conviction in 2006 was filed but the appeal was withdrawn. Baker alleged that his counsel was ineffective in allowing him to withdraw the appeal. We read this as a claim that counsel, as appellate counsel, provided ineffective assistance because, by allowing him to withdraw the appeal, counsel failed to raise issues of trial error on appeal. In case No. S-12-1181, there is no indication that Baker filed a direct appeal from his plea-based conviction in 2007. In his postconviction motion, however, he makes a general claim that he was denied effective assistance of counsel on direct appeal. Given the lack of clarity in his motion, for purposes of the present

analysis only, we will read this as a claim that appellate counsel was ineffective.

Given our interpretation of Baker's motions, because Baker's trial counsel was also his appellate counsel in each case, these postconviction proceedings are his first opportunity to assert claims that his trial counsel provided ineffective assistance. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012). These claims are layered ineffectiveness claims—i.e., a claim that his appellate counsel was ineffective for failing to raise claims of his trial counsel's ineffective assistance. When a case presents layered claims of ineffective assistance of counsel, we determine whether the petitioner was prejudiced by his or her appellate counsel's failure to raise issues related to his or her trial counsel's performance. *Id.* See, also, *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). If the trial counsel did not provide ineffective assistance, then the petitioner cannot show prejudice from the appellate counsel's alleged ineffectiveness in failing to raise the issue on appeal. See *id.*

The bulk of Baker's claims in both case No. S-12-1180 and case No. S-12-1181 concerns his assertion that a hearing should have been held to determine whether he was competent to stand trial. He claims that counsel was ineffective for failing to request a hearing, that it was misconduct for prosecutors to fail to request a hearing, and that the trial court erred when it failed to order a hearing. Also, his claims that counsel was ineffective with respect to allowing him to waive a speedy trial and allowing him to withdraw his appeal in case No. S-12-1180 are based on his argument that he was not competent to make such decisions.

[11] We have stated that in order to demonstrate prejudice from counsel's failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted. See *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011). No prejudice is evident in this case. Baker merely alleged that he was on various medications at the time of his trials and that such medication made

him incompetent. He listed various medications he was taking and listed the possible side effects of such medications, but he made no allegations of fact to the effect that he suffered particular side effects or other narrative to support his claim that such medications made him incompetent. As the district court noted, Baker's claims of incompetence are contradicted by the record in each case, wherein the trial court observed Baker and had no reason to doubt his competence. The trial court questioned Baker regarding his competence and specifically addressed the effect of the medications on his competence. Because the allegations and the record do not show that Baker would have been found incompetent, he failed to show that counsel was ineffective for failure to request a hearing. For the same reason, his allegations surrounding prosecutor misconduct or trial court error with respect to competence are also without merit.

Baker made other claims of ineffective assistance of counsel in each case, including his claim in case No. S-12-1181 that counsel was ineffective with respect to speedy trial issues and his claims in case No. S-12-1180 that counsel was ineffective with respect to the motion to recuse and the plea in abatement. We conclude that the district court did not err when it rejected such claims without an evidentiary hearing. In each case, Baker's allegations of ineffective assistance of trial counsel are conclusory, are refuted by the record, and are not pleaded in enough detail to warrant an evidentiary hearing. We therefore conclude that Baker did not allege sufficient facts which, if proved, would establish a reasonable probability that the outcome of his case would have been different but for his trial counsel's alleged deficient performance.

As stated above, Baker's trial counsel was also his appellate counsel, and therefore, we must determine whether Baker was prejudiced by his appellate counsel's alleged failure to raise on appeal issues related to his trial counsel's effectiveness at trial. Based on our conclusion that Baker's trial counsel was not ineffective, we conclude that Baker cannot show prejudice from his appellate counsel's alleged ineffectiveness in failing to raise these issues on direct appeal. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

## CONCLUSION

Baker's motions for postconviction relief in these two cases do not allege facts which constitute a denial of his constitutional rights, and, as to certain allegations, the record refutes his claims. Therefore, the district court did not err when it denied Baker's motion for postconviction relief in each case without an evidentiary hearing.

AFFIRMED.

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MICHAEL E., INDIVIDUALLY AND AS GUARDIAN AND  
NEXT FRIEND ON BEHALF OF HIS MINOR CHILD,  
AVALYN J., APPELLANT, V. STATE OF  
NEBRASKA ET AL., APPELLEES.  
839 N.W.2d 542

Filed September 6, 2013. No. S-12-812.

1. **Motions to Dismiss: Immunity: Appeal and Error.** An appellate court reviews de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party.
2. **Actions: Immunity.** A suit against a state agency is a suit against the State and is subject to sovereign immunity.
3. **Actions: Public Officers and Employees: Immunity: Appeal and Error.** In reviewing actions against state officials, a court must determine whether an action against individual officials sued in their official capacities is in reality an action against the state and therefore barred by sovereign immunity.
4. **Actions: Parties: Public Officers and Employees: Immunity: Waiver: Damages.** In an action for the recovery of money, the State is the real party in interest. And sovereign immunity—if not waived—bars a claim for money even if the plaintiff has named individual state officials as nominal defendants.
5. **Actions: Public Officers and Employees: Immunity.** To the extent a plaintiff seeks to compel a state official to take actions that require the official to expend public funds, state sovereign immunity bars the suit.
6. **Constitutional Law: Immunity: Public Officers and Employees: Declaratory Judgments: Injunction.** In an action brought under 42 U.S.C. § 1983 (2006), 11th Amendment immunity does not bar an action against a state or state officials for prospective declaratory or injunctive relief.
7. **Public Officers and Employees: Immunity.** State sovereign immunity does not bar an action against state officials to restrain them from performing an affirmative act or to compel them to perform an act they are legally required to do unless the affirmative act would require the officials to expend public funds.

8. **Public Officers and Employees: Immunity: Liability.** If a plaintiff has sued a state official in the official's individual capacity, a court must determine whether qualified immunity shields the state official from civil damages.
9. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Qualified immunity shields state officials in their individual capacities from civil damages if their conduct did not violate a clearly established statutory or constitutional right of which a reasonable person would have known.
10. **Parental Rights.** A parent's right to maintain custody of his or her child is a natural right, subject only to the paramount interest which the public has in protecting the rights of the child.
11. **Constitutional Law: Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.
12. **Parental Rights.** Even a parent's natural right to the care and custody of a child is limited by the State's power to protect the health and safety of its resident children.
13. **Juvenile Courts: Jurisdiction: Child Custody: Parental Rights.** The State's protective umbrella begins when a juvenile court acquires jurisdiction at the adjudication phase based on the child's present living conditions. The custodial rights of parents normally arise at the dispositional phase.
14. **Parental Rights: Minors: Due Process: Notice.** Procedural due process requires notice to the person whose rights are affected by an adjudication proceeding and a reasonable opportunity to refute or defend against the allegations.
15. **Child Custody: Parental Rights: Marriage: Adoption: Proof.** When a child is born or adopted during a marriage, a court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
16. **Parent and Child.** Parental rights do not spring full blown from the biological connection between parent and child. They require relationships more enduring.
17. **Parent and Child: Paternity: Proof.** If an unmarried father has custody and an established relationship with his child, a state may not deprive that father of custody without showing that he is an unfit parent.
18. **Constitutional Law: Paternity: Adoption: Proof.** When an unmarried father has established familial ties with his biological child and has provided support, his relationship acquires substantial constitutional protection. Thus, the State may not statutorily eliminate the need for his consent to an adoption.
19. **Paternity: Parental Rights: Minors.** Adjudicated fathers, as a class, can have parental rights at stake in juvenile proceedings.
20. **Due Process: Minors: Notice.** In a juvenile proceeding alleging abuse, neglect, or dependency, due process requires the State to provide notice and an opportunity to be heard to a child's known adjudicated or biological father who is providing substantial and regular financial support for his child.
21. **Constitutional Law: Parent and Child: Child Support.** The fact that an unmarried, biological father has paid his child support obligations is insufficient to

create a fundamental liberty interest in a familial relationship that is entitled to heightened constitutional protection.

22. **Juvenile Courts: Parent and Child: Child Custody.** Unless a known biological father appears and shows a juvenile court that he has shouldered the responsibilities of parenting, in addition to providing financial support, the court is not required to determine that he is an unfit parent before it can place the child with a third party. Nonetheless, consistent with a juvenile court's broad discretion to determine the placement of an adjudicated child that will serve the child's best interests, the court may consider placement with an unmarried, biological father if removal from the child's home is necessary.
23. **Paternity: Notice.** If the State shows that an unmarried, biological father's whereabouts are unknown and that he has not supported his child, then he is not a parent entitled to notice and an opportunity to be heard in a juvenile proceeding involving his child born out of wedlock.
24. \_\_\_\_: \_\_\_\_: Neb. Rev. Stat. §§ 43-263 and 43-265 (Reissue 2008) cannot be constitutionally applied to avoid notifying a known adjudicated or biological father, who has provided financial support to his child, of abuse, neglect, or dependency proceedings involving his child. In that circumstance, the State must comply with the notification procedures that are statutorily required for other noncustodial parents—before the dispositional phase.
25. **Public Officers and Employees: Immunity.** Whether a state official should prevail in a qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.
26. **Constitutional Law: Courts: Statutes.** Generally, a right cannot be clearly established when the conduct complained of was authorized by statute and no court had decided the issue when the conduct occurred.
27. **Injunction: Damages.** An injunction is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is actual and substantial injury.
28. \_\_\_\_: \_\_\_\_: A court should not grant an injunction unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed.

Amy Sherman, of Sherman & Gilner, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and John M. Baker, Special Assistant Attorney General, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

### SUMMARY

Michael E., individually and on behalf of his daughter, Avalyn J., brought this civil rights action under 42 U.S.C. § 1983 (2006). The defendants are the State, the Department of Health and Human Services (the Department), and six of the Department's employees. He alleged that because the defendants failed to notify him of juvenile proceedings regarding Avalyn, they interfered with his and Avalyn's constitutional rights to familial integrity, substantive due process, and equal protection. Michael sued the employees in their official and individual capacities. In addition, he claimed that Neb. Rev. Stat. §§ 43-263 and 43-265 (Reissue 2008) were unconstitutional.

The district court determined that §§ 43-263 and 43-265 were unconstitutional, facially and as applied to Michael. But it concluded that sovereign immunity barred Michael's action against the State, the Department, and the employees in their official capacities. It further determined that the employees, in their individual capacities, were entitled to qualified immunity because they were following unconstitutional statutes, which had not previously been declared unconstitutional. The court dismissed Michael's request for injunctive relief to restrain the State from unlawfully applying the notification statutes.

We will explain our holding with specificity in the following pages, but briefly stated, it is this:

- To the extent that Michael sought monetary damages, the court correctly determined that sovereign immunity barred Michael's claims against the State, the Department, and the Department's employees in their official capacities.
- In a juvenile proceeding alleging abuse, neglect, or dependency, due process requires the State to provide notice and an opportunity to be heard to a child's known, financially supportive adjudicated or biological father.
- The court correctly determined that qualified immunity shielded the Department's employees from liability in their individual capacities because they did not violate a clearly established right.

- The court correctly dismissed Michael's claim for injunctive relief. No reasonable probability existed that the State would again fail to notify him of any future juvenile proceedings after the court granted him shared custody of Avalyn.

## BACKGROUND

### HISTORY OF JUVENILE PROCEEDINGS

Avalyn was born out of wedlock in September 2002. Michael and April J. are her biological parents. It is unknown from the pleadings what Michael and April's relationship was before or after Avalyn's birth. At an unspecified date, a court entered a paternity and support decree in a "title IV-D" action. A title IV-D action refers to the Department's authorization to seek a child support order when a party is receiving services under title IV-D of the federal Social Security Act. The court found that Michael was Avalyn's biological father and ordered him to pay child support but did not order visitation. That order is not part of this record.

In 2005, the State took temporary emergency protective custody of Avalyn on two separate occasions after April attempted suicide. In September, the county attorney filed a juvenile petition, seeking an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The county attorney did not give notice to Michael. After April admitted the allegations, the juvenile court placed Avalyn in foster care with her maternal grandmother. Because the grandmother agreed to live with April, the court returned Avalyn to April's home. The disposition order continued this arrangement. The court's adjudication order in September stated that the "'father of child, Michael [E.], to be notified of proceedings, if address is available.'" But the caseworkers did not notify Michael before the disposition hearing. Michael, however, alleged that because he was paying child support through the State, the caseworkers knew or should have known how to contact him.

About 6 months after the disposition, on April 25, 2006, Michael received a letter from the State Foster Care Review Board notifying him of the proceedings. On May 8, he wrote the juvenile court, which allowed Michael to intervene.

After notifying Michael in April 2006, the Department provided services to him to determine whether Avalyn's placement with him and his wife would be in Avalyn's best interests. In October 2006, the court placed Avalyn with Michael and his wife. Later, the State provided mediation services for Michael and April to resolve their custody and visitation disputes. The court continued Avalyn's placement with Michael through November 2007, when the parties stipulated that Avalyn should be placed with April but divide her time evenly between April and Michael.

The defendants alleged that before April 2006, when Michael learned of the juvenile proceedings, he had not tried to establish a relationship with Avalyn or he had acquiesced in April's request that he not do so. They alleged that his only contact with Avalyn "consisted of some birthday and Christmas gifts and court-ordered child support automatically withheld from his paycheck when he was working."

#### PROCEDURAL HISTORY OF CIVIL RIGHTS ACTION

In Michael's § 1983 action, he alleged separate "causes of action." Under three of these headings, he alleged that the defendants interfered with his constitutional right to familial integrity by failing to notify him of Avalyn's status as a ward of the State. He also alleged that the defendants violated his right to equal protection of the law by providing services to April but not to him. He sought a declaration that the State had violated his constitutional rights. For these claims, he sought monetary damages and attorney fees. The six employees whom he sued are the three caseworkers who were assigned to Avalyn's juvenile case at different times and their immediate supervisors.

Michael also claimed that §§ 43-263 and 43-265 were unconstitutional to the extent that they permitted the State to avoid notifying a noncustodial parent of juvenile proceedings involving the parent's child. He sought a temporary and permanent injunction to prohibit the unlawful application of these statutes for himself and for all others similarly situated.

The defendants moved to dismiss Michael's action in its entirety. They alleged that the court lacked subject matter jurisdiction and that Michael had failed to state a claim that entitled him to relief.

The court concluded that the State had not waived its sovereign immunity and that Michael had not alleged that the caseworkers took a deliberate course of conduct not to notify him. It further concluded that Michael's pleadings did not show he had an established relationship with Avalyn. The court reasoned that even if Michael had been notified and appeared, his allegations did not show that the juvenile court would have placed Avalyn in his custody. Because the State had not waived its sovereign immunity, the court dismissed Michael's claims seeking monetary damages and a declaration that the defendants had violated his constitutional rights.

Later, however, the court ruled that Michael had alleged sufficient facts to state a claim that §§ 43-263 and 43-265 were unconstitutional. It concluded that the juvenile court had found Michael was a fit parent for custody and that he therefore had a due process right to notice of the proceedings. The court found that because of the paternity decree, the Department knew Michael was Avalyn's father and knew his address. It found that this knowledge was illustrated by the Department's notice to Michael in April 2006.

Although the Department had technically complied with the statutes, the court concluded that §§ 43-263 and 43-265 were unconstitutional, facially and as applied. It reasoned that the statutes cannot constitutionally eliminate notification of juvenile proceedings to a noncustodial parent. But because the State had not waived its sovereign immunity, the court dismissed Michael's requests for temporary and permanent injunctions to restrain the State from unlawfully applying these statutes against him and all other similarly situated parents.

Michael then moved for summary judgment, which motion the court overruled. It concluded that the Department's employees were entitled to sovereign immunity in their official capacities. It further found that in their individual capacities, qualified immunity shielded them because their conduct was

merely negligent in following the statutes, which had not been declared unconstitutional. Later, the court issued an order dismissing Michael's action.

### ASSIGNMENTS OF ERROR

Michael assigns, restated and renumbered, that the court erred in (1) determining that the defendants were immune from liability; (2) failing to determine that an exception to immunity applied; (3) determining that he did not allege a violation of any constitutionally protected right; (4) dismissing the State and the Department from his claims regarding the constitutionality of §§ 43-263 and 43-265; (5) failing to sustain his motion for summary judgment on these two causes of action; (6) failing to issue an injunction; (7) failing to issue a judgment for him on his claims that §§ 43-263 and 43-265 were unconstitutional; and (8) dismissing his action.

### STANDARD OF REVIEW

[1] We review *de novo* whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party.<sup>1</sup>

### ANALYSIS

Michael contends that the State unlawfully interfered with his and Avalyn's fundamental right to each other's companionship and his fundamental right to the custody and control of his child. He argues that the state employees, whom he sued in their official and individual capacities, are not entitled to qualified immunity because they knew or should have known that their actions violated a clearly established constitutional right to familial integrity.

Additionally, Michael contends that sovereign immunity does not bar his claim against the State and the Department because (1) a plaintiff can sue local governments for constitutional

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<sup>1</sup> See, *Findlay v. Lendermon*, No. 12-3881, 2013 WL 2992392 (7th Cir. June 14, 2013); *Bailey v. Pataki*, 708 F.3d 391 (2d Cir. 2013); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013); *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324 (4th Cir. 2008); *Holz v. Nenana City Public School Dist.*, 347 F.3d 1176 (9th Cir. 2003); *McKinney v. Okoye*, 282 Neb. 880, 806 N.W.2d 571 (2011).

deprivations caused by their employees' widespread, persistent pattern of unconstitutional misconduct and (2) sovereign immunity does not bar a claim for prospective declaratory or injunctive relief.

The State, of course, views the matter differently. It contends that the State of Nebraska, its agencies, and its officials—sued in their official capacities—are immune from suit under 42 U.S.C. § 1983. It argues that sovereign immunity bars such suits and that the State has not waived its immunity.

Regarding Michael's claims against the employees in their individual capacities, the State contends that qualified immunity shields them from liability. The State argues that they are immune because Michael has not alleged that any state employee purposefully, willfully, or deliberately failed to notify him of the juvenile court proceedings involving Avalyn. The State contends that the caseworkers' conduct did not constitute a civil rights violation because when they failed to notify Michael, they reasonably believed that they were following constitutional statutes.

#### SOVEREIGN IMMUNITY PRINCIPLES

[2-5] Because Michael's claims fall under 42 U.S.C. § 1983, we follow federal precedent.<sup>2</sup> Contrary to Michael's argument, his action is not against a local government. A suit against a state agency is a suit against the State and is subject to sovereign immunity.<sup>3</sup> In reviewing actions against state officials, a court must determine whether an action against individual officials sued in their official capacities is in reality an action against the state and therefore barred by sovereign immunity.<sup>4</sup> In an action for the recovery of money, the State is the real party in interest. And sovereign immunity—if not waived—bars a claim for money even if the plaintiff has named individual state officials as nominal defendants.<sup>5</sup> In addition, to the extent a plaintiff seeks to compel a state official to take actions

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<sup>2</sup> See, e.g., *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006).

<sup>3</sup> See *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

<sup>4</sup> *Id.*

<sup>5</sup> See *id.*

that require the official to expend public funds, state sovereign immunity bars the suit.<sup>6</sup>

[6,7] But in an action brought under 42 U.S.C. § 1983, 11th Amendment immunity does not bar an action against a state or state officials for prospective declaratory or injunctive relief.<sup>7</sup> Similarly, state sovereign immunity does not bar an action against state officials to restrain them from performing an affirmative act or to compel them to perform an act they are legally required to do unless the affirmative act would require the officials to expend public funds.<sup>8</sup>

[8,9] But if a plaintiff has sued a state official in the official's individual capacity, a court must determine whether qualified immunity shields the state official from civil damages. Qualified immunity shields state officials in their individual capacities from civil damages if their conduct did not violate a clearly established statutory or constitutional right of which a reasonable person would have known.<sup>9</sup>

Applying these principles, we agree with the State that sovereign immunity bars Michael's claims—to the extent that Michael seeks monetary damages—against the State, the Department, and its employees in their official capacities. But Michael also sought a declaration that the State had violated his constitutional rights by failing to give him notice and an opportunity to be heard in the juvenile proceedings. And he sought an injunction to restrain state officials from failing to notify him in the future. Sovereign immunity did not bar those claims against state officials, and the court erred in dismissing them from the suit on Michael's declaratory and injunctive relief claims. We now turn to the merits of Michael's claims that §§ 43-263 and 43-265 are unconstitutional to the extent

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<sup>6</sup> See, *id.*; *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

<sup>7</sup> See, *Frew v. Hawkins*, 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004); *Doe*, *supra* note 3.

<sup>8</sup> See, *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012); *Doe*, *supra* note 3.

<sup>9</sup> See, *Ashby*, *supra* note 6; *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds*, *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

they permitted the State to avoid notifying him of the juvenile proceedings and that he was entitled to injunctive relief to prohibit this unlawful application in the future.

#### DUE PROCESS REQUIRED

##### NOTICE TO MICHAEL

[10,11] A parent's right to maintain custody of his or her child is a natural right, subject only to the paramount interest which the public has in protecting the rights of the child.<sup>10</sup> The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.<sup>11</sup>

[12,13] Yet, even a parent's natural right to the care and custody of a child is limited by the State's power to protect the health and safety of its resident children.<sup>12</sup> The State's protective umbrella begins when a juvenile court acquires jurisdiction at the adjudication phase based on the child's present living conditions. The custodial rights of parents normally arise at the dispositional phase.<sup>13</sup>

[14] This does not mean, however, that a parent is without rights at the adjudication phase. Procedural due process requires notice to the person whose rights are affected by an adjudication proceeding and a reasonable opportunity to refute or defend against the allegations.<sup>14</sup> And the Nebraska Court of Appeals has extended the right to notice of an adjudication proceeding to a noncustodial parent.<sup>15</sup> "If a parent is not accorded

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<sup>10</sup> *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

<sup>11</sup> *Id.*

<sup>12</sup> See *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987).

<sup>13</sup> See, *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005); *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

<sup>14</sup> See *In re Interest of Mainor T. & Estela T.*, *supra* note 10.

<sup>15</sup> See *In re Interest of B.J.M. et al.*, 1 Neb. App. 851, 510 N.W.2d 418 (1993) (citing *In re Interest of L. V.*, 240 Neb. 404, 482 N.W.2d 250 (1992)). See, also, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

his or her due process rights, the parent can readily appear and ask the court to terminate jurisdiction upon a showing that the child is no longer in need of protection.”<sup>16</sup>

[15] These rules clearly apply when a child is born or adopted during a marriage. “A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right . . . .”<sup>17</sup> When a juvenile court does not return an adjudicated child to his or her custodial parent at the dispositional stage, it must consider placement with the child’s noncustodial parent before placing the child with an unrelated third party.<sup>18</sup>

But in those cases, the court was dealing with children who were born during the noncustodial parent’s marriage, even though the parents were separated or divorced when the State filed a juvenile petition. We have not previously decided in a juvenile case whether an unmarried, biological father should have an opportunity to participate in juvenile proceedings. U.S. Supreme Court precedent guides us in that determination.

[16] “‘*Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*’”<sup>19</sup> In cases dealing with an unmarried father’s right to object to an adoption, the U.S. Supreme Court has drawn a demarcation between “a mere biological parent” and “a natural father who has played a substantial role in rearing his child”<sup>20</sup>:

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<sup>16</sup> *In re Interest of Amanda H.*, 4 Neb. App. 293, 302, 542 N.W.2d 79, 86 (1996).

<sup>17</sup> *In re Interest of Amber G. et al.*, *supra* note 13, 250 Neb. at 982, 554 N.W.2d at 149.

<sup>18</sup> See *id.*

<sup>19</sup> *Lehr v. Robertson*, 463 U.S. 248, 260, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983) (emphasis in original) (quoting *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979)).

<sup>20</sup> *Id.*, 463 U.S. at 262 n.18. Accord *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.2d 404 (2009).

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by “com[ing] forward to participate in the rearing of his child,” . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he “act[s] as a father toward his children.” . . . But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. “[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children . . . as well as from the fact of blood relationship.” . . .

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.<sup>21</sup>

[17,18] Under these principles, the Supreme Court has held that if an unmarried father has custody and an established relationship with his child, a state may not deprive that father of custody without showing that he is an unfit parent.<sup>22</sup> And we have held that when an unmarried father has established familial ties with his biological child and has provided support, his relationship acquires substantial constitutional protection. Thus, the State may not statutorily eliminate the need for his consent to an adoption.<sup>23</sup>

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<sup>21</sup> *Id.*, 463 U.S. at 261-62.

<sup>22</sup> See *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

<sup>23</sup> *In re Adoption of Corbin J.*, *supra* note 20.

But the State argues that because Michael's allegations failed to show an established familial relationship, he did not allege a violation of his right to familial integrity. As stated, the pleadings do not discuss Michael and April's relationship before or after Avalyn's birth. But Michael's declaratory judgment claim presents a procedural due process question that exists even if he did not have a familial relationship with his child. We must decide what process is due to an adjudicated father in an abuse, neglect, or dependency proceeding when the State's officials know only that a noncustodial adjudicated father exists and that he has provided regular and substantial financial support to his child.

[19] First, we point out the obvious. Michael is not a putative father; he is Avalyn's adjudicated father. And we have held that Nebraska's adoption statutes eliminating the need for a putative father's consent to an adoption when he has not registered in the State's putative father registry do not apply to an adjudicated father.<sup>24</sup> We have also held that depending on the circumstances, unmarried, biological fathers may obtain custody or visitation rights with their children.<sup>25</sup> So adjudicated fathers, as a class, can have parental rights at stake in juvenile proceedings.

These potential rights raise a concern that unless an adjudicated or biological father has an opportunity to be heard, a juvenile court may lack crucial information for determining the constitutional protection afforded to the father's interests. For example, the court may not know whether the father has acknowledged paternity of his child and provided regular and substantial financial support, lived with the child before separating from the mother, shouldered parental responsibilities, had significant visitation with the child, or been hindered in his efforts to have contacts with his child.

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<sup>24</sup> See *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006).

<sup>25</sup> See, *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004); *White v. Mertens*, 225 Neb. 241, 404 N.W.2d 410 (1987); *State ex rel. Laughlin v. Hugelman*, 219 Neb. 254, 361 N.W.2d 581 (1985).

This lack of information creates a substantial risk that the State will erroneously deprive an unmarried father of a protected liberty interest in a relationship with his child.<sup>26</sup> Conversely, the burden on the State to notify a known adjudicated or biological father is low when compared to the parental rights potentially at stake.<sup>27</sup>

[20,21] So we conclude that in a juvenile proceeding alleging abuse, neglect, or dependency, due process requires the State to provide notice and an opportunity to be heard to a child's known adjudicated or biological father who is providing substantial and regular financial support for his child. But we reject the argument that unless the State shows that an unmarried, noncustodial father is an unfit parent, a juvenile court must always place his biological child in his custody before considering custody with an unrelated third party. The mere opportunity to present facts relevant to the father's relationship with the child and his fitness for custody does not create a right to custody. And the fact that an unmarried, biological father has paid his child support obligations is insufficient to create a fundamental liberty interest in a familial relationship that is entitled to heightened constitutional protection.

For example, in *Quilloin v. Walcott*,<sup>28</sup> the Supreme Court held that a state court did not violate an unmarried father's due process rights by determining that a stepfather's adoption of his children was in their best interests. The unmarried father did not legally establish his paternity of the children for an 11-year period before the adoption petition was filed. So due process did not require the court to find that the biological father was an unfit parent before approving the adoption. And the biological father's occasional visits and support obligations did not affect the result:

Although appellant was subject, for the years prior to these proceedings, to essentially the same child-support obligation as a married father would have had, . . . he has

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<sup>26</sup> See, e.g., *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

<sup>27</sup> See *Chase v. Neth*, 269 Neb. 882, 697 N.W.2d 675 (2005).

<sup>28</sup> *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.<sup>29</sup>

[22] Unless a known biological father appears and shows a juvenile court that he has shouldered the responsibilities of parenting, in addition to providing financial support, the court is not required to determine that he is an unfit parent before it can place the child with a third party. Nonetheless, consistent with a juvenile court's broad discretion to determine the placement of an adjudicated child that will serve the child's best interests,<sup>30</sup> the court may consider placement with an unmarried, biological father if removal from the child's home is necessary.

[23] But we disagree with the district court that §§ 43-263 and 43-265 are facially unconstitutional. If the State shows that an unmarried, biological father's whereabouts are unknown and that he has not supported his child, then he is not a parent entitled to notice and an opportunity to be heard in a juvenile proceeding involving his child born out of wedlock.

[24] We agree with the court, however, that §§ 43-263 and 43-265 cannot be constitutionally applied to avoid notifying a known adjudicated or biological father, who has provided regular and substantial financial support to his child, of abuse, neglect, or dependency proceedings involving his child. In that circumstance, the State must comply with the notification procedures that are statutorily required for other noncustodial parents—before the dispositional phase. But we emphasize that due process is satisfied by notice and an opportunity to be heard. If an unmarried, biological father does not grasp that opportunity and show a familial relationship, the court need not delay acting in the child's best interests.

Despite our conclusion that due process required the State to give Michael notice and an opportunity to be heard, the State argues that the Department's employees are immune from Michael's claim for monetary damages.

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<sup>29</sup> *Id.*, 434 U.S. at 256.

<sup>30</sup> *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

MICHAEL'S RIGHT TO NOTICE AND  
OPPORTUNITY TO BE HEARD WAS  
NOT CLEARLY ESTABLISHED

Because we conclude that the State's procedures did not comply with due process, we consider whether qualified immunity shielded the Department's employees, in their individual capacities, from civil damages.

[25] Whether a state official should prevail in a qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.<sup>31</sup>

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.<sup>32</sup>

[26] As the district court concluded, §§ 43-263 and 43-265 require the State to give notice only to the custodial parent. And before this case, the Court of Appeals had judicially extended the notification requirement, on due process grounds, to a noncustodial parent only when the child was born during the parents' marriage. Nebraska courts had not decided whether an adjudicated father with no previous custody rights arising from a marital relationship was entitled to notice. Generally, a right cannot be clearly established when the conduct complained of was authorized by statute and no court had decided the issue when the conduct occurred.<sup>33</sup>

But Michael claims the Department did not follow its own regulations. He cites the Department's regulations requiring caseworkers to make reasonable efforts to notify a noncustodial parent when a child has been placed in an out-of-home

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<sup>31</sup> See *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

<sup>32</sup> *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (citation omitted).

<sup>33</sup> See *Shearer*, *supra* note 9 (Connolly, J., concurring; Miller-Lerman, J., joins) (citing *Duncan v. Gunter*, 15 F.3d 989 (10th Cir. 1994)).

setting.<sup>34</sup> Additionally, if the Department determines that intervention is necessary, a caseworker must forward to the county attorney the names of each family member residing in the home and the name and address of any absent biological or legal parent.<sup>35</sup>

The juvenile court, however, did not place Avalyn in an out-of-home setting. The court placed her with her maternal grandmother, who agreed to live with April and Avalyn at their home. Michael did not include the county attorney as a party to this action, so his suggestion that the caseworkers did not provide his information to the county attorney is speculative.

But under the regulations, the requirement of notice to a noncustodial parent clearly hinged upon an out-of-home placement. And we do not read these regulations as putting temporary, emergency custody of a child on the same footing as an out-of-home placement. Even if that were true, the caseworkers' failure to interpret the regulations in that manner would be at most negligent conduct, not a constitutional violation.<sup>36</sup> The district court correctly determined that the Department employees' qualified immunity defense shielded them from liability for civil damages.

MICHAEL WAS NOT ENTITLED  
TO INJUNCTIVE RELIEF

Michael argues that he was entitled to an injunction to enjoin the State and its officers from applying §§ 42-263 and 42-265 to avoid notifying him or other noncustodial biological fathers of juvenile proceedings involving their children. But we agree with the State that an injunction is inappropriate in this case.

[27,28] An injunction is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is an actual and substantial injury.<sup>37</sup> And a court should

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<sup>34</sup> See 390 Neb. Admin. Code, ch. 7, § 001.04 (1998).

<sup>35</sup> See 390 Neb. Admin. Code, ch. 8, § 001.05 (2000).

<sup>36</sup> See *Ashby*, *supra* note 6.

<sup>37</sup> *Bock v. Dalbey*, 283 Neb. 994, 815 N.W.2d 530 (2012).

not grant an injunction unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.<sup>38</sup>

Michael now has shared custody of Avalyn, and he limited his claim for injunctive relief to the unlawful application of the statutes to a *noncustodial* biological father. He is no longer a noncustodial biological father. So he is no longer in any danger of injury, and this is not a class action filed on behalf of other noncustodial biological fathers. The court did not err in denying injunctive relief.

### CONCLUSION

We conclude that the district court correctly determined that sovereign immunity barred Michael's claims against the State, the Department, and its employees in their official capacities, to the extent that Michael seeks monetary damages. But sovereign immunity did not bar Michael's claims for declaratory and injunctive relief, and the court erred in dismissing state officials from the suit regarding those claims.

We reverse the court's determination that §§ 43-263 and 43-265 are facially unconstitutional. But we conclude that in a juvenile proceeding alleging abuse, neglect, or dependency, due process requires the State to provide notice and an opportunity to be heard to a child's known adjudicated or biological father who is providing substantial and regular financial support for his child. Sections 43-263 and 43-265 cannot be constitutionally applied to avoid this notification.

We conclude that Michael was not entitled to injunctive relief to enjoin the State and its officers from unlawfully applying §§ 43-263 and 43-265 to avoid notifying him of any future juvenile proceedings. And we conclude that the state employees who failed to notify Michael of the juvenile proceedings involving Avalyn are shielded from liability for civil damages because Michael's right to notification was not clearly established when their conduct occurred.

AFFIRMED IN PART, AND IN PART REVERSED.

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<sup>38</sup> *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE  
OF THE NEBRASKA SUPREME COURT, RELATOR,  
v. ROBERT L. KEITH, RESPONDENT.  
840 N.W.2d 456

Filed September 13, 2013. No. S-13-003.

Original action. Judgment of suspension.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK,  
MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

### INTRODUCTION

The conditional admission of respondent, Robert L. Keith, is before the court. Respondent was admitted to the practice of law in the State of Nebraska on April 22, 2003. On June 14, 2012, respondent was suspended from the practice of law for nonpayment of his Nebraska State Bar Association dues for 2012. He remains suspended.

On January 3, 2013, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges consisting of one count against respondent. In count I, it was alleged that by his conduct, respondent had violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-505.5(a) (rev. 2012) (unauthorized practice of law) and 3-508.4(a) (misconduct). Count I contained an additional allegation which was not admitted. As noted below, because the Counsel for Discipline has declared the discipline proposed in the conditional admission to be appropriate, we read the Counsel for Discipline's declaration to be a withdrawal of the additional allegation. On January 23, the Counsel for Discipline filed additional formal charges consisting of two additional counts against respondent. In the two additional counts, it was alleged that by his conduct, respondent had violated his oath of office as an attorney and Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence), 3-508.1(b) (bar admission and disciplinary matters), and 3-508.4(a), (c), and (d) (misconduct). Respondent filed an answer to the formal charges and additional formal charges on April 4.

On July 17, 2013, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney, § 7-104, and professional conduct rules §§ 3-501.3, 3-505.5(a), 3-508.1(b), and 3-508.4(a), (c), and (d), and knowingly chose not to challenge or contest the truth of the matters conditionally admitted and waived all proceedings against him in connection therewith in exchange for suspension without the possibility for reinstatement prior to January 1, 2014. Respondent's conditional admission further provided that as part of respondent's application for reinstatement, he must demonstrate that he has paid all delinquent dues to the Nebraska State Bar Association; he has completed at least 10 hours of continuing legal education, including 2 hours of ethics or professional responsibility instruction, within the 12 months immediately preceding the date of his application; he has provided proof that he has reimbursed his client, Schlecht Construction, LLC, all funds previously paid to respondent as fees; and he has paid all costs assessed against him herein.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's request for suspension and other sanctions is appropriate.

Upon due consideration, we approve the conditional admission and order that respondent continue to be suspended until January 1, 2014. Should respondent apply for reinstatement, as part of his application, respondent must demonstrate that he has paid all delinquent dues; completed at least 10 hours of continuing legal education, including 2 hours of ethics or professional responsibility instruction, within the 12 months immediately preceding the date of his application; reimbursed his client, Schlecht Construction; and paid all costs assessed against him herein.

## FACTS

### *Count I.*

With respect to count I, the formal charges state that respondent had failed to pay his bar dues for 2012, such that the Counsel for Discipline sent several advisory notices to

respondent and this court issued a show cause order. On June 14, 2012, respondent still had not paid his dues, and he was suspended from the practice of law for the nonpayment of dues. After he was suspended, respondent appeared as counsel with clients in three cases on June 18 and 25.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104, professional conduct rules §§ 3-505.5(a) and 3-508.4(a), and another allegation we understand to have been withdrawn.

### *Count II.*

With respect to count II, the additional formal charges state that on October 3, 2012, the Counsel for Discipline received a grievance letter from a client, Schlecht Construction, alleging that respondent was retained in the fall of 2011 to incorporate the Schlecht family company. The Schlecht family paid respondent in December 2011. The additional formal charges state that at the time of filing the grievance, the family members had received numerous promises from respondent that respondent was completing work on their matter. On May 3, 2012, respondent sent an e-mail to one of the family members advising that "‘everything is sent and should be on file in the next day or two.’" By the middle of June, the family members could not get an answer from respondent, so the family members checked with the Secretary of State and learned that the paperwork to incorporate the family company had not been filed. The family members themselves finalized the paperwork and filed it with the Secretary of State on June 28.

The additional formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-501.3 and 3-508.4(a) and (c).

### *Count III.*

Count III generally concerns respondent's failure to adequately respond to the Counsel for Discipline's inquiries regarding appearing on behalf of clients after suspension as reflected in count I and neglecting a client's matter as reflected

in count II. With respect to count III, the additional formal charges again noted that on June 14, 2012, respondent had been suspended for nonpayment of his bar dues. On June 26, the Counsel for Discipline called respondent to advise him that the Counsel for Discipline had been informed that respondent was practicing law while under suspension. Respondent indicated that he was intending to take care of matters with the Nebraska State Bar Association.

On June 27, 2012, the Counsel for Discipline sent a grievance letter to respondent via certified mail directing respondent to submit an appropriate written response addressing the allegations that he was practicing law while under suspension, as set forth in count I. Respondent received the grievance letter on June 29.

Respondent had not submitted a response by the middle of August 2012, so the Counsel for Discipline called respondent and left a voice mail message. On August 27, respondent returned the call and indicated that he would “get things straightened out” with the Nebraska State Bar Association. The Counsel for Discipline reminded respondent that he had not yet submitted a written response.

By October 31, 2012, respondent had not submitted a response to the matters set forth in count I, so a complaint was sent to him by the Counsel for Discipline pursuant to Neb. Ct. R. § 3-309(G) (rev. 2011) of the disciplinary rules. Respondent never responded to the complaint.

On October 3, 2012, the Counsel for Discipline received the grievance from the Schlecht family, as set forth in count II. On October 4, a copy of the Schlecht grievance was forwarded to respondent via certified mail along with a letter from the Counsel for Discipline directing respondent to submit an appropriate written response to the concerns raised in the grievance letter. Respondent received the Counsel for Discipline’s letter and the grievance on October 11. Respondent had not submitted an appropriate written response to the Schlecht grievance by November 20, so a reminder letter was sent to respondent. As of the filing date of the additional formal charges, respondent had not submitted written responses to either grievance set forth in count I or count II.

The additional formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-508.1(b) and 3-508.4(d).

### ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

(B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. By its declaration, we understand that the Counsel for Discipline withdraws its charge to the matter not admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.3, 3-505.5(a), 3-508.1(b), and 3-508.4(a), (c), and (d), as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

### CONCLUSION

Respondent's suspension from the practice of law is continued until January 1, 2014. Should respondent apply for reinstatement, his application for reinstatement must demonstrate that respondent has paid all delinquent dues to the Nebraska State Bar Association; has completed at least 10 hours of continuing legal education, including 2 hours of ethics or professional responsibility instruction, within 12 months immediately preceding the date of respondent's application; has reimbursed his client, Schlecht Construction, all funds previously paid to respondent as fees; and has paid all costs assessed against respondent herein. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

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STATE OF NEBRASKA, APPELLEE, v.  
DANIEL MORGAN, APPELLANT.  
837 N.W.2d 543

Filed September 20, 2013. No. S-12-410.

1. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.

4. **Jury Instructions.** Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.
5. **Homicide.** The absence of a sudden quarrel is not an element of the crime of murder in the first degree.
6. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
7. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
8. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
9. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
10. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
11. \_\_\_\_: \_\_\_\_\_. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
12. \_\_\_\_: \_\_\_\_\_. To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
13. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
14. **Effectiveness of Counsel: Proof.** In an ineffective assistance of counsel claim, deficient performance and prejudice can be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
15. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

David S. MacDonald, Deputy Scotts Bluff County Public Defender, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LEMAN, and CASSEL, JJ.

CASSEL, J.

## I. INTRODUCTION

Escalating tensions culminated when Daniel Morgan shot and killed Dominic Marquez outside of Marquez' home during an altercation. Following a jury trial, the district court convicted Morgan of first degree murder and use of a firearm to commit a felony. In this direct appeal, we first reject Morgan's challenges to the step jury instruction relating to the charge of first degree murder and the court's refusal to give a "negative element of 'sudden quarrel'" instruction. We reason that (1) we have repeatedly upheld the use of a step instruction, (2) the elements of first degree murder exclude any reference to "sudden quarrel," and (3) the jury's presumed adherence to the step instruction precludes any prejudice regarding the rest of the instruction. We then turn to Morgan's four claims of ineffective assistance of counsel, finding the record insufficient to address two of them and concluding the others lack merit. Accordingly, we affirm the judgment of the district court.

## II. BACKGROUND

Conflict arose between Morgan and Marquez over Megan Mitchell, who began dating Morgan in July 2010 after an earlier relationship with Marquez that resulted in the birth of a child.

On May 13, 2011, Morgan's frustration with Marquez came to a head. Morgan decided to go to Marquez' house in order to talk to Marquez and "kind of force the issue, either convince him to back off . . . or see . . . if he was going to

back down or start a fight.” Morgan sent Mitchell a text message at 12:56 p.m. which stated, “‘I’m going for [Marquez], that’s my only purpose now, just how it goes.’” At around 1 p.m., Morgan sent Mitchell another text message which stated, “‘[Marquez’ child] won’t ever know him, I will take that as a bonus.’”

Morgan drove his Jeep Grand Cherokee to Marquez’ house. As Marquez was leaving the house in his Chevrolet Avalanche, he “ram[med] into” Morgan’s Jeep. Morgan grabbed a firearm that was underneath his back seat, “chambered a round,” and fired at Marquez’ Avalanche. Morgan testified that Marquez’ Avalanche was “under power” and next to Morgan’s Jeep at the time Morgan began firing. When Marquez backed his Avalanche into Morgan’s Jeep, the Jeep was pushed sideways and Morgan was unable to disengage his Jeep from the Avalanche. Morgan emptied an entire clip while both vehicles were moving. Morgan reloaded with a second clip and continued firing in an attempt to get Marquez to “back off.” Morgan fired approximately 12 rounds of the second clip, but he still was unable to disengage his Jeep from the Avalanche. Morgan then got out, walked to the front of his Jeep, and fired the remainder of the rounds at the Avalanche. At that point, Marquez “let [Morgan] off enough” that Morgan could get back in the Jeep and leave.

Neighbors provided differing accounts of the sequence of events. One neighbor testified he heard a noise that he thought was the sound of firecrackers and then saw somebody shooting a gun out of a vehicle. He then heard a noise that sounded like metal hitting metal and saw a person get out of the Jeep, walk around to the front passenger side of the Jeep, and begin shooting. A different neighbor testified that he heard a scraping sound and then a series of pops. A third neighbor heard some popping sounds outside and then heard the crash of two vehicles. She testified that she saw Marquez’ vehicle backing out of the driveway and “then the other vehicle like rammed in to where the truck bed would be and like it was kind of pinned.” She saw a man get out of the vehicle, go around to the front of Marquez’ vehicle, raise his arm toward Marquez’ windshield, and then she heard more popping sounds.

Morgan testified that all of the shots were fired after the Avalanche hit his Jeep. He denied planning or intending to kill Marquez. Rather, he testified that he fired the gun because Marquez “rammed into [his Jeep] at full speed” and prevented him from leaving. Morgan admitted that he fired toward the driver’s seat, but he testified that he did not intend to shoot Marquez in the head. Marquez died of multiple gunshot wounds. His body had six gunshot wounds to the left side of the forehead, neck, and chin.

The jury returned a verdict finding Morgan guilty of first degree murder and using a firearm to commit a felony. The district court sentenced Morgan to life imprisonment for the first degree murder conviction and a consecutive term of 17 to 34 years’ imprisonment for the use of a firearm conviction. Morgan timely appeals.

### III. ASSIGNMENTS OF ERROR

Morgan assigns that the district court erred in instructing the jury by (1) refusing to give his requested instruction on the negative element of “sudden quarrel” in the second degree murder instruction; (2) giving a jury instruction that was confusing and that “effectively instructed the jury to not consider” the lesser-included offenses of second degree murder and manslaughter; and (3) refusing to give his requested instruction on the constitutional right to defend self, family, home, and others.

[1] Morgan’s brief contains no argument directed toward the last assignment of error regarding jury instructions. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.<sup>1</sup> Because Morgan did not make an argument specific to this alleged error, we do not consider it.

Morgan also assigns that he was denied the effective assistance of trial counsel by counsel’s failure to (1) retain ballistic and accident reconstruction experts, (2) object to the jury’s seeing Morgan in shackles, (3) object to the prosecutor’s referring to the events of the day as “murder,” and (4) object or

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<sup>1</sup> *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

file a motion in limine to prevent evidence envelopes from being published to the jury with the word “murder” displayed on them.

#### IV. STANDARD OF REVIEW

[2] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.<sup>2</sup>

[3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.<sup>3</sup>

#### V. ANALYSIS

##### 1. JURY INSTRUCTIONS

The step jury instruction given by the court, to which Morgan objected, was similar to the language of pattern jury instruction NJI2d Crim. 3.1. Consistent with NJI2d Crim. 3.1, the instruction given by the court directed the jury to decide whether the State had proved each element of first degree murder beyond a reasonable doubt and, if so, “then you must find the defendant guilty of first degree murder and stop.” But if the jury found that the State had not proved the material elements of first degree murder, the jury was instructed to proceed to consider the elements of the lesser-included offenses of second degree murder and manslaughter.

[4] The district court did not err in using a step instruction with language similar to a pattern jury instruction. Although we have recently found deficiencies in the content of a step instruction in the circumstances of a particular case,<sup>4</sup> we have consistently rejected challenges to the use of a step

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<sup>2</sup> *State v. Valverde*, ante p. 280, 835 N.W.2d 732 (2013).

<sup>3</sup> *State v. Pittman*, 285 Neb. 314, 826 N.W.2d 862 (2013).

<sup>4</sup> See *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

instruction.<sup>5</sup> Whenever an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should usually be given to the jury in a criminal case.<sup>6</sup> The court did not err in utilizing a step instruction.

[5] Morgan's proposed jury instruction on the "negative element of 'sudden quarrel'" has no place in an instruction on first degree murder. Under the relevant portion of Neb. Rev. Stat. § 28-303 (Reissue 2008), a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. Thus, the three elements which the State must prove beyond a reasonable doubt to obtain a conviction for first degree murder are that the defendant (1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated malice.<sup>7</sup> The absence of a sudden quarrel is not an element of the crime of murder in the first degree. Because the absence of a sudden quarrel is not an element of the crime, the court did not err in refusing to include it as an element in the instruction given to the jury.

[6] The district court's refusal to give Morgan's proposed jury instruction in the balance of the step instruction could not be reversible error, because Morgan suffered no prejudice. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.<sup>8</sup> Morgan's proposed instruction included under second degree murder that he "did so intentionally, but without premeditation" and that he "did not do so as the result of a sudden quarrel." But the jury did not need to consider the elements of second degree murder, because it concluded that the State had proved the elements of first degree murder. In

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<sup>5</sup> See, e.g., *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012); *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

<sup>6</sup> *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

<sup>7</sup> *Id.*

<sup>8</sup> *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009).

*State v. Alarcon-Chavez*,<sup>9</sup> we concluded that a step instruction could not have been prejudicial, because the jury convicted the defendant of first degree murder; thus, the jury did not reach the differences between second degree murder and manslaughter upon a sudden quarrel. We reach the same conclusion in the case before us. Because the jury convicted Morgan of first degree murder, the jury properly did not proceed to consider the elements of second degree murder. Thus, Morgan was not prejudiced and his substantial rights were not affected by the remainder of the step instruction. Although at oral argument the State suggested that we should nonetheless opine on the correctness of the second degree murder instruction, we find it unnecessary to do so in resolving the case before us and decline the State's invitation.

## 2. CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

[7] Because different attorneys represented Morgan at trial and on direct appeal, he must now assert any known or apparent claims of ineffective assistance of counsel. Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.<sup>10</sup> Morgan raises four instances of alleged ineffective assistance of counsel, which we discuss below.

[8,9] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.<sup>11</sup> An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.<sup>12</sup> As

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<sup>9</sup> *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

<sup>10</sup> *State v. Watt*, *supra* note 6.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

discussed below, the record is not sufficient to address two of Morgan's claims.

[10-14] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,<sup>13</sup> the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.<sup>14</sup> To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.<sup>15</sup> To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.<sup>16</sup> The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.<sup>17</sup> Deficient performance and prejudice can be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.<sup>18</sup>

We now address each claim of ineffectiveness raised by Morgan.

#### (a) Failure to Retain Experts

Morgan asserts that counsel performed deficiently by failing to retain an expert who could have provided a scientific basis for Morgan's explanation of events, i.e., the firing of certain shots, where the shots originated, and the sequence of events. He argues that an accident reconstructionist and a ballistics expert could have explained certain matters to support the defense theory. The parties agree—as do we—that the record

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<sup>13</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>14</sup> *State v. Watt*, *supra* note 6.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

is insufficient to review this claim. We make no comment whether Morgan's allegations regarding this claim would be sufficient to require an evidentiary hearing in the context of a motion for postconviction relief. We simply decline to reach this claim on direct appeal, because the record is insufficient to do so.

(b) Failure to Object to Shackles

Prior to trial, the district court ordered that Morgan "shall appear at all times in the presence of prospective jurors in civilian clothing and without shackles." Morgan argues that his counsel performed deficiently by failing to object to the jury's seeing Morgan brought to court every day in shackles. The record contains no information regarding any circumstances where the jury may have seen Morgan in shackles. Once again, we make no comment on the sufficiency of the allegation in the context of a motion for postconviction relief. We agree with the parties that the record is insufficient to review this claim on direct appeal. Accordingly, we do not reach it.

(c) Failure to Object to  
"Murder" Reference

During the State's cross-examination of Morgan, the prosecutor asked the following question: "And you maintained that relationship from that point until May 13th, the time of the murder?" Defense counsel did not object. Morgan argues, "In such a context it was presumptuous, inflammatory[,] and conclusory and invaded the province of the jury to decide if it was [m]urder, [m]anslaughter, or self defense."<sup>19</sup>

[15] Morgan cannot establish prejudice by counsel's failure to object, because the jury was instructed that statements or questions by the attorneys are not evidence. Instruction No. 1 stated in part that "what the attorneys say is not evidence." Instruction No. 5 provided a list of things that are not evidence, the first of which was "[s]tatements, arguments, and questions of the lawyers for the parties in this case." Absent

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<sup>19</sup> Brief for appellant at 27.

evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.<sup>20</sup> Because we must presume that the jury followed the instructions and did not treat counsel's fleeting reference to "murder" as evidence, Morgan cannot demonstrate a reasonable probability that the result of the proceeding would have been different if counsel had objected.

(d) Failure to Prevent Evidence Envelopes  
From Being Published With Word  
"Murder" Displayed

Morgan contends that counsel was ineffective in failing to file a motion in limine or to object at trial to prevent the evidence envelopes for certain exhibits from being published to the jury with the word "murder" printed on them. Morgan contends that "[i]t amounted to [a] repetitive drum beat by the police of 'Murder,' 'Murder,' 'Murder.' Twenty nine times."<sup>21</sup>

Again, Morgan cannot demonstrate a reasonable probability that the result of the proceeding would have been different if counsel had filed a motion in limine or objected. The evidence envelopes were marked with a description of the contents, location where the evidence was found, the investigator or investigators who recovered the evidence, Morgan's name, Marquez' name, and the word "murder." Law enforcement officers used "murder" in a general sense to refer to an unlawful killing that they were investigating rather than in a technical or legal sense. And the jury was instructed in part: "The fact that the state has brought these charges is not evidence of anything. The charges are simply an accusation, nothing more." Further, the jury was instructed that it could return one of four verdicts: guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, or not guilty. Again, we presume that the jury followed the instructions given by the court.<sup>22</sup> Like the charges brought by the State, law enforcement's placement of the word "murder" on its evidence envelopes during its investigation is

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<sup>20</sup> *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

<sup>21</sup> Brief for appellant at 27.

<sup>22</sup> See *State v. Sandoval*, *supra* note 20.

not evidence of anything. We conclude that Morgan has not established prejudice by counsel's failure to object or to otherwise keep the evidence envelopes from being published to the jury with the word "murder" on them.

## VI. CONCLUSION

We conclude that there was no prejudicial error in the district court's giving of the step jury instruction or in its refusal to give Morgan's proposed instruction. We further conclude that two of Morgan's claims of ineffective assistance of counsel are without merit, but that the record is insufficient to review the other two claims.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, v.  
WA'IL MUHANNAD, APPELLANT.  
837 N.W.2d 792

Filed September 20, 2013. No. S-13-042.

1. **Motions for Mistrial; Pleadings; Prosecuting Attorneys; Intent; Appeal and Error.** While the denial of a plea in bar generally involves a question of law, an appellate court reviews under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial.
2. **Double Jeopardy.** Traditionally, the Double Jeopardy Clause has been viewed as safeguarding three interests of defendants: (1) the interest in being free from successive prosecutions, (2) the interest in the finality of judgments, and (3) the interest in having the trial completed in front of the first tribunal.
3. **Constitutional Law: Double Jeopardy.** The constitutional protection against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal, the defendant is entitled to go free if the trial fails to end in a final judgment.
4. \_\_\_\_: \_\_\_\_\_. Balanced against a defendant's interests in having a trial completed in front of the first tribunal is society's right to one full and fair opportunity to prove the defendant's guilt.
5. \_\_\_\_: \_\_\_\_\_. When society is deprived of its right to attempt to prove a defendant's guilt in a single prosecution because of a trial error, the interests of society in vindicating its laws generally outweigh the double jeopardy interests of the defendant.
6. **Double Jeopardy; Motions for Mistrial.** It is the general rule that where a court grants a mistrial upon a defendant's motion, the Double Jeopardy Clause does not bar a retrial.

7. \_\_\_\_: \_\_\_\_\_. Only where the governmental conduct in question is intended to goad a defendant into moving for a mistrial may the defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on the defendant's own motion.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

McCORMACK, J.

#### NATURE OF CASE

Appellant, Wa'il Muhannad, was charged with first degree sexual assault of his stepdaughter, M.H. During trial, M.H.'s therapist testified that the event causing M.H.'s posttraumatic stress disorder (PTSD) was Muhannad's sexually abusing her. The trial court allowed this testimony over Muhannad's objection, but later concluded that the testimony was reason to grant Muhannad's motion for a mistrial. Muhannad then filed a plea in bar, which the court denied. The issue is whether the State's questioning of the therapist was intended to goad Muhannad into moving for a mistrial, such that the State could get a second chance at a more favorable prosecution and thereby circumvent the protections of the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions. We affirm the denial of the plea in bar.

#### BACKGROUND

M.H.'s mother married Muhannad in 2006, when M.H. was 10 years old. M.H. lived continuously with her mother and Muhannad except for brief periods when she stayed with her biological father. In 2011, M.H. disclosed that Muhannad had been sexually abusing her. The State charged Muhannad with first degree sexual assault of a child.

### MOTION IN LIMINE

Before trial, Muhannad moved in limine to exclude the testimony of Carrie Gobel, M.H.'s psychotherapist. Muhannad argued that the prosecution intended to have Gobel testify as to whether M.H. was telling the truth. Muhannad argued that such testimony would invade the province of the jury and, furthermore, that Gobel was not qualified to opine on the subject.

The State explained it wished to call Gobel to testify about "the symptoms of children who have been sexually abused." It further intended for Gobel to testify that M.H. had PTSD. Finally, the State expected Gobel to testify that M.H. exhibited "certain symptoms of the sexual abuse." The trial court denied the motion in limine, and the case proceeded to trial.

### TRIAL

M.H. was 16 years old at the time of trial. M.H. stated that sometime around 2008 or 2009, Muhannad began sexually abusing her. It began with Muhannad's touching her when they were watching a movie at home. M.H. recalled that the movie was "'Reign Over Me.'"

M.H. testified that soon thereafter, Muhannad began to have intercourse with her three to four times a week. M.H. described that Muhannad would either come into her bedroom at night or have intercourse with her during times in the day when her mother was not home.

M.H. testified that Muhannad always ejaculated into a napkin. He asked her twice to take pregnancy tests, and M.H. described those tests in detail. M.H. described incidents where Muhannad made her watch pornography with him. M.H. said that sometimes Muhannad told her to use a vibrator while he watched. She also testified that Muhannad made her give him manual stimulation and oral sex. M.H. testified that Muhannad said he would kill her if she told anyone about the assaults.

In May 2011, M.H.'s mother picked M.H. up from school and told M.H. that Muhannad had given her the "final talaq." M.H.'s mother explained that the final talaq was the final act, under Islam, of divorcing one's wife. After hearing this news,

M.H. revealed the assaults to her mother. M.H.'s mother testified that M.H. was "shaking, scared, crying" when she reported the abuse. M.H. explained that she chose to finally disclose the abuse to her mother when she learned of the final talaq, "[b]ecause I had come to, like, an understanding of my mom wouldn't hurt me or she wouldn't, like, tell me that I was lying." M.H.'s mother called the police.

An Omaha police officer responded to the call. The officer interviewed the mother and M.H. and described M.H. as "very shy and talked under her breath and looked down at the ground." The officer took M.H. and her mother to a hospital.

At the hospital, a nurse conducted a forensic sexual assault examination of M.H. M.H. testified that the last sexual contact between herself and Muhannad was before school on the same day she told her mother about the abuse. There was some dispute about whether M.H. had previously reported that the last assault had been the day before.

M.H. testified that on the morning of the last alleged assault, she was taking a shower when Muhannad entered the bathroom and asked her to exit the shower. Muhannad then directed M.H. to lean up against the sink while he had intercourse with her from behind. Muhannad ejaculated into a napkin. After Muhannad left the bathroom, M.H. again showered, dressed, and went to school.

The nurse was unable to find any foreign pubic hairs during the forensic examination, and a DNA analyst confirmed that no semen or other foreign DNA was found on M.H. The nurse testified she did not expect to find semen or pubic hair, however, because of the position in which the last reported assault took place and because Muhannad had ejaculated into a napkin. Furthermore, M.H. had showered and had gone to the bathroom after the assault.

Defense counsel pointed out the lack of physical evidence supporting the allegations of abuse. Defense counsel also pointed out details of M.H.'s story that M.H. was describing for the first time at trial. Principally, these details included the instances where Muhannad asked her to use a vibrator and when he made her take pregnancy tests.

Defense counsel also noted M.H.'s delayed reporting of the abuse. Defense counsel particularly focused on when M.H. had written an affidavit listing the reasons she wanted to live with her biological father. At that time, M.H. did not disclose sexual abuse as one of those reasons.

Defense counsel suggested that M.H.'s mother conspired to get Muhannad arrested so she could marry another man who allegedly wanted to take over a business that she and Muhannad owned. That man was their business partner. Defense counsel asked M.H.'s mother if, before the sexual abuse accusations, she had "aspirations . . . of somehow creating a way that [she] could get [Muhannad] out of the picture."

Defense counsel pointed out that M.H.'s mother "married" that man—who was also her friend's husband—shortly after receiving the final talaq from Muhannad. And defense counsel implied that M.H.'s mother pressured M.H. to make allegations of sexual abuse in order to carry out this scheme to get Muhannad "out of the picture." Admittedly, M.H.'s mother had told M.H. that "it would be a shame" if Muhannad got out of jail and M.H. ended up there instead. M.H. similarly testified that her mother told her she would get in trouble if she changed her story.

But M.H.'s mother denied having any plan to get Muhannad "out of the picture" so another man could take over the business with her. In fact, she testified that the business shut down after Muhannad's arrest.

M.H. clarified that no one had ever told her to lie about the sexual abuse. M.H.'s mother explained that she had made the comment about who would be going to jail when M.H. was fearful of testifying. M.H.'s mother said she was confused about the penal consequences for refusing to testify.

Defense counsel also suggested that M.H. had fabricated the sexual assaults in order to keep Muhannad from divorcing her mother. It was undisputed that, at least at times, M.H. was opposed to Muhannad's divorcing her mother. In fact, M.H. testified that when Muhannad sent M.H.'s mother the second talaq, M.H. had threatened Muhannad that she would report the sexual assaults if he divorced her mother.

## GOBEL'S TESTIMONY

In this context, the State called Gobel as its last witness. Gobel is a licensed mental health practitioner with training in sexual abuse. Gobel was M.H.'s therapist for the 2 years leading up to trial.

Gobel testified that M.H. had been diagnosed with PTSD. She described M.H.'s symptoms, which included anxiety, hypervigilance, racing thoughts, estrangement from others, irritability, and a sense of a foreshortened future. Without objection, Gobel testified that during her sessions with M.H., M.H. would have intrusive thoughts about "the sexual abuse." Gobel further testified, without objection, that M.H. had nightmares about the abuse and that M.H. reported being more easily irritated by a sister who resembled Muhannad.

Then the prosecutor asked, "According to your assessment and your ongoing treatment with [M.H.], can you describe for me what you believe to be the traumatic event that has caused this diagnosis?" Defense counsel objected to the question as invading the province of the jury. During the sidebar that followed, the court asked, "Do you think [Gobel's] testifying that she believes that having been sexually abused is relying on the credibility? I mean, she's making an assumption. That's the basis of her diagnosis. Whether she believes it or not is not relevant." The prosecutor argued in a similar vein: "The distinction between [Gobel's] credibility is different from what — based upon the sources that she's received her information that she can ultimately indicate based upon her professional opinion that that diagnosis or the traumatic event that caused that is, in fact, the sex abuse."

The court overruled defense counsel's objection, and the prosecutor again asked Gobel, "According to your assessment of [M.H.], what was the traumatic event that initiated the diagnosis of PTSD?" Gobel answered, "[M.H.] was sexually abused by her stepfather, [Muhannad], for an extensive period of time."

Gobel went on to explain, without objection, that a child is unlikely to remember every instance of abuse in cases of prolonged periods of sexual abuse. Gobel further detailed some of

the reasons delayed disclosure is common in cases of sexual abuse of a child.

At the close of the case and before closing arguments, there was more discussion between the attorneys and the court about whether Gobel's testimony had impermissibly vouched for M.H.'s truthfulness. The court again expressed its opinion that Gobel was simply explaining what she was treating M.H. for—based upon M.H.'s reports to Gobel.

On the prosecutor's own initiative, she then sought to clarify what would be appropriate closing arguments:

[Prosecutor]: I guess, just while we bring that up the issue, in closing argument, I think based on what you're saying, Judge — and I think I understand what you're saying — it would not be appropriate at all for us to stand up and say . . . Gobel thinks [M.H.] was sexually assaulted.

[Court]: No.

[Prosecutor]: It's only appropriate to say [Gobel was] treating [M.H.] for [PTSD] related to sexual abuse.

[Court]: Right. Thank you. Exactly.

[Prosecutor]: We'll make sure we don't say it wrong in the argument.

#### MOTION FOR MISTRIAL

The following day, defense counsel moved for a mistrial. The prosecutor argued against the motion. The prosecutor explained that she did not intend to solicit "an answer regarding the individual's credibility." Rather, "[i]t was a question with respect to what traumatic event the diagnosis went to." The court agreed: "I reviewed the testimony last night, and I believe that the answer was [the] basis upon which the diagnosis was formed and the information that [Gobel] had received, and not the ultimate statement of who was the perpetrator of such even[t]."

The court thus denied the motion for mistrial. It also denied defense counsel's motion for directed verdict. But, after a short recess in which the court conducted additional research, the court changed its mind. It granted Muhannad's motion for a mistrial. The court explained that while Gobel might

have been able to opine that “sexual abuse” was the cause of M.H.’s PTSD, Gobel’s testimony was “over the edge” when she stated her belief that Muhannad was the perpetrator of the sexual abuse.

#### PLEA IN BAR

The court was prepared to retry the case the following Monday, but defense counsel filed a plea in bar to the retrial. Defense counsel argued that the State had an obligation to know the law and that the law was clear the testimony the State elicited was inadmissible. Defense counsel further argued that the State was “on notice” at the time of the motion in limine that this type of questioning impermissibly infringed upon the province of the jury.

Defense counsel did not, however, argue that the State specifically intended to provoke a mistrial through such questioning. Instead, defense counsel argued that the U.S. Supreme Court in *Oregon v. Kennedy*<sup>1</sup> had held that the double jeopardy bar to retrial was not limited to circumstances where the State intended to provoke a mistrial.

The prosecutor disagreed with defense counsel’s reading of *Oregon v. Kennedy* and argued that it had no intention to provoke a mistrial.

The court denied the plea in bar. The court rejected defense counsel’s reading of *Oregon v. Kennedy*.<sup>2</sup> The court found that the prosecutor did not intend to goad Muhannad into moving for a mistrial. In fact, the court concluded that there appeared to be no tactical advantage for the State by forcing a mistrial.

In reaching the conclusion that the prosecutor did not intend to provoke a mistrial, the court found that the strength of the State’s case was not weak and that the progression of the trial appeared to be in the State’s favor. The court found that before the conduct causing the mistrial, there was no pattern of prosecutorial misconduct or escalation of any questionable conduct. Rather, the event leading to the mistrial was an isolated

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<sup>1</sup> *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982).

<sup>2</sup> Citing *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

incident. The court found that the timing of the State's conduct did not support an inference that the prosecutor intended to cause a mistrial. Finally, the court found that the prosecutor resisted the motion for mistrial.

The court concluded that the prosecutor made "an error in judgment." Muhannad now appeals the denial of the plea in bar.

### ASSIGNMENT OF ERROR

Muhannad assigns as error the trial court's determination that retrial was not barred by double jeopardy principles.

### STANDARD OF REVIEW

[1] While the denial of a plea in bar generally involves a question of law, we review under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial.<sup>3</sup>

### ANALYSIS

The parties do not dispute the propriety of the mistrial. The issue is whether concepts of double jeopardy bar a retrial and, thus, the court should have granted Muhannad's plea in bar.

[2] Traditionally, the Double Jeopardy Clause has been viewed as safeguarding three interests of defendants: (1) the interest in being free from successive prosecutions, (2) the interest in the finality of judgments, and (3) the interest in having the trial completed in front of the first tribunal.<sup>4</sup> This appeal involves the defendant's interest in having the trial completed in front of the first tribunal.<sup>5</sup>

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<sup>3</sup> See, *U.S. v. Radosh*, 490 F.3d 682 (8th Cir. 2007); *Robinson v. Wade*, 686 F.2d 298 (5th Cir. 1982); *United States v. Curtis*, 683 F.2d 769 (3d Cir. 1982); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Michael J.*, 274 Conn. 321, 875 A.2d 510 (2005); *State v. Thomas*, 275 Ga. 167, 562 S.E.2d 501 (2002); *People v. Campos*, 349 Ill. App. 3d 172, 812 N.E.2d 16, 285 Ill. Dec. 427 (2004); *People v. Dawson*, 431 Mich. 234, 427 N.W.2d 886 (1988). See, also, *State v. Lewis*, 78 Wash. App. 739, 898 P.2d 874 (1995).

<sup>4</sup> *State v. Rogan*, 91 Haw. 405, 984 P.2d 1231 (1999).

<sup>5</sup> See, e.g., *Oregon v. Kennedy*, *supra* note 1; *United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976).

[3-5] The constitutional protection against double jeopardy does not mean that every time a defendant is put to trial before a competent tribunal, the defendant is entitled to go free if the trial fails to end in a final judgment.<sup>6</sup> Balanced against a defendant's interests in having the trial completed in front of the first tribunal is society's right to one full and fair opportunity to prove the defendant's guilt.<sup>7</sup> When society is deprived of its right to attempt to prove a defendant's guilt in a single prosecution because of a trial error, the interests of society in vindicating its laws generally outweigh the double jeopardy interests of the defendant.<sup>8</sup>

[6] Furthermore, it is the general rule that where a court grants a mistrial upon a defendant's motion, the Double Jeopardy Clause does not bar a retrial.<sup>9</sup> A defendant's motion for a mistrial constitutes a deliberate election on his or her part to forgo the right to the trial completed before the first trier of fact.<sup>10</sup> This is true even if the defendant's motion is necessitated by prosecutorial or judicial error.<sup>11</sup> When the mistrial is declared at the defendant's behest, the defendant's right to have his or her trial completed by a particular tribunal is, as a general matter, subordinated to the public's interest in fair trials designed to end in just judgments.<sup>12</sup>

[7] In *Oregon v. Kennedy*, the U.S. Supreme Court defined a "narrow exception"<sup>13</sup> to this balance: "Only where the governmental conduct in question is intended to 'goad' the

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<sup>6</sup> *State v. Marshall*, *supra* note 3.

<sup>7</sup> See *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

<sup>8</sup> See *State v. Rogan*, *supra* note 4.

<sup>9</sup> *Oregon v. Kennedy*, *supra* note 1.

<sup>10</sup> *State v. Bostwick*, *supra* note 2; *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982).

<sup>11</sup> *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971); *State v. Bostwick*, *supra* note 2.

<sup>12</sup> See, *Oregon v. Kennedy*, *supra* note 1; *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 2d 974 (1949); *State v. Bostwick*, *supra* note 2.

<sup>13</sup> *Oregon v. Kennedy*, *supra* note 1, 456 U.S. at 673.

defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.”<sup>14</sup> The Court rejected any more generalized standard of bad faith conduct, harassment, or overreaching as an exception to the defendant’s waiver of his or her right to a determination by the first tribunal.<sup>15</sup>

The Court explained that a standard based on the extent of prosecutorial misconduct is an untenable one. It refused to “add another classification of prosecutorial error” beyond those already established for trial error and for trial error warranting mistrial “without supplying any standard by which to assess that error.”<sup>16</sup> The Court concluded that in contrast to a standard based on the extent of the error, a standard that examines the intent of the prosecutor, though certainly not entirely free from practical difficulties, is a manageable standard to apply.<sup>17</sup>

“Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on [the] defendant’s motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.”<sup>18</sup> Only when there is intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause is the defendant’s election to move for a mistrial but a “hollow shell.”<sup>19</sup> Only then does the defendant no longer “‘retain primary control over the course to be followed in the event of [the prosecutorial] error.’”<sup>20</sup>

The Supreme Court noted that “[e]very act on the part of a rational prosecutor during a trial is designed to ‘prejudice’ the

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<sup>14</sup> *Id.*, 456 U.S. at 676.

<sup>15</sup> *Oregon v. Kennedy*, *supra* note 1.

<sup>16</sup> *Id.*, 456 U.S. at 675.

<sup>17</sup> *Oregon v. Kennedy*, *supra* note 1.

<sup>18</sup> *Id.*, 456 U.S. at 675-76.

<sup>19</sup> *Id.*, 456 U.S. at 673.

<sup>20</sup> *Id.*, 456 U.S. at 676.

defendant by placing before the judge or jury evidence leading to a finding of his guilt.”<sup>21</sup> Furthermore, due to the complexity of the rules of evidence, it is likely that some evidence offered by the prosecutor will be objectionable.<sup>22</sup> The more serious of these prosecutorial infractions will warrant a mistrial.<sup>23</sup> But “[t]he law has never looked upon the declaration of a mistrial . . . as [a] mild slap[] upon the wrist.”<sup>24</sup> A mistrial is a “rigorous means for redressing even grossly negligent and deliberate misconduct.”<sup>25</sup> When the prosecution suffers a mistrial, it suffers “a stern rebuke in terms of lost days, lost dollars, lost resources of many varieties and the lost opportunity to make the conviction stick.”<sup>26</sup> “It is only in the Machiavellian situation where the prosecutor deliberately courts a mistrial that the normal sanctions are self-evidently inadequate. A scheming prosecutor cannot be rewarded by being handed the very thing toward which he connived.”<sup>27</sup>

We have consistently held that the Double Jeopardy Clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution.<sup>28</sup> We have accordingly declined to extend the *Oregon v. Kennedy* exception beyond situations where the prosecutor intended that the misconduct would provoke a mistrial.<sup>29</sup>

It is the defendant’s burden to prove this intent.<sup>30</sup> The trial court’s finding regarding whether the prosecuting attorney

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<sup>21</sup> *Id.*, 456 U.S. at 674.

<sup>22</sup> *Oregon v. Kennedy*, *supra* note 1.

<sup>23</sup> *Id.*

<sup>24</sup> *Fields v. State*, 96 Md. App. 722, 744, 626 A.2d 1037, 1048 (1993).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 744-45, 626 A.2d at 1048.

<sup>28</sup> *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., *Oregon v. Kennedy*, *supra* note 1 (Stevens, J., concurring in the judgment; Brennan, Marshall, and Blackmun, JJ., join); *U.S. v. Perlaza*, 439 F.3d 1149 (9th Cir. 2006); *Robinson v. Com.*, 17 Va. App. 551, 439 S.E.2d 622 (1994).

intended to cause a mistrial is a finding of fact.<sup>31</sup> While the denial of a plea in bar generally involves a question of law,<sup>32</sup> most courts review for clear error the trial court's finding concerning prosecutorial intent to goad the defendant into moving for mistrial.<sup>33</sup> This is consistent with our standard of review for other findings of fact by the trial court, and we hereby adopt it.

A trial court makes its finding of subjective intent by “[i]nferring the existence or nonexistence of intent from objective facts and circumstances . . . .”<sup>34</sup> An appellate court can review similar evidence in determining whether the trial court clearly erred in its finding.

In *Oregon v. Kennedy*, the Court refused to disturb the lower court's finding that the prosecutor had not intended to provoke a mistrial by asking a witness whether he refused to do business with the defendant because the defendant was a “‘crook.’”<sup>35</sup> It did not elaborate further on the evidence reviewed in reaching that decision. Justice Powell, however, noted in his concurring opinion three relevant circumstances that convinced him this finding was correct: (1) There was no sequence of overreaching before the single prejudicial question; (2) it was evident from a colloquy between counsel and the court that the prosecutor not only resisted, but also was surprised by the defendant's motion for a mistrial; and (3) at the hearing on the defendant's double jeopardy motion, the prosecutor testified and the trial court found as a fact that there was no intention to cause a mistrial.<sup>36</sup>

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<sup>31</sup> *Oregon v. Kennedy*, *supra* note 1. See, *U.S. v. Lun*, 944 F.2d 642 (9th Cir. 1991); *Robinson v. Com.*, *supra* note 30.

<sup>32</sup> See *State v. Marshall*, *supra* note 3.

<sup>33</sup> See, *U.S. v. Radosh*, *supra* note 3; *Robinson v. Wade*, *supra* note 3; *United States v. Curtis*, *supra* note 3; *State v. Michael J.*, *supra* note 3; *State v. Thomas*, *supra* note 3; *People v. Campos*, *supra* note 3; *People v. Dawson*, *supra* note 3. See, also, *State v. Lewis*, *supra* note 3.

<sup>34</sup> *Oregon v. Kennedy*, *supra* note 1, 456 U.S. at 675.

<sup>35</sup> *Id.*, 456 U.S. at 669.

<sup>36</sup> *Oregon v. Kennedy*, *supra* note 1 (Powell, J., concurring).

Some state and federal courts have accordingly set forth factors to consider when evaluating the question of an intention to goad the defendant into moving for mistrial. Certain courts have adopted the three factors articulated by Justice Powell.<sup>37</sup> At least one court has set forth a four-factor inquiry: (1) whether there was a sequence of overreaching or error prior to the error resulting in the mistrial; (2) whether the prosecutor resisted the motion for a mistrial; (3) whether the prosecutor testified, and the court below found, that there was no intent to cause a mistrial; and (4) the timing of the error.<sup>38</sup> Another court has adopted a three-factor inquiry more focused on motive: (1) whether the record contains any indication that the prosecutor believed the defendant would be acquitted, (2) whether a second trial would be desirable for the government, and (3) whether the prosecutor proffered some plausible justification for its actions.<sup>39</sup>

We find all of the above-listed factors appropriate for consideration. But we decline to adopt a closed list that might limit a trial court's inquiry into a prosecutor's intent or our inquiry into whether the trial court's finding of intent was clearly erroneous. In addition to any objective factors listed above or that might be relevant under the particular circumstances of a particular case, we bear in mind that the trial court is in a better position than a reviewing court to judge the motives and intentions of the prosecutor.<sup>40</sup>

The record here supports the trial court's conclusion that the prosecutor simply made "an error in judgment." In other words, it does not appear from the record that the prosecutor intentionally committed prosecutorial misconduct—let alone intended that her misconduct would provoke a mistrial.

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<sup>37</sup> See, *U.S. v. White*, 914 F.2d 747 (6th Cir. 1990); *State v. Girts*, 121 Ohio App. 3d 539, 700 N.E.2d 395 (1997).

<sup>38</sup> *State v. Torres*, 328 N.J. Super. 77, 744 A.2d 699 (2000).

<sup>39</sup> See *United States v. Curtis*, *supra* note 3.

<sup>40</sup> *People v. Campos*, *supra* note 3. See, also, *U.S. v. Pavloyianis*, 996 F.2d 1467 (2d Cir. 1993); *State v. Michael J.*, *supra* note 3.

It is not always easy to tell when an expert crosses the line into forbidden testimony on truthfulness.<sup>41</sup> We have only a handful of cases in Nebraska defining that line between permissible indirect bolstering of the alleged victim's credibility and impermissible direct or indirect bolstering of the alleged victim's credibility.

In *State v. Roenfeldt*,<sup>42</sup> we held that an expert's testimony of the symptoms, behavior, and feelings generally exhibited by children who have been sexually abused was relevant and admissible. "[F]ew jurors," we explained, "have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship."<sup>43</sup> Furthermore, "the behavior exhibited by sexually abused children is often contrary to what most adults would expect."<sup>44</sup> Similar testimony was upheld by the Nebraska Court of Appeals in *State v. Bruna*.<sup>45</sup> In that case, the psychologist took it a step further by setting forth the factors to consider in evaluating the veracity of a child's sexual abuse claims.<sup>46</sup>

In *State v. Doan*,<sup>47</sup> in contrast, the Court of Appeals held that the expert crossed the line when she testified that the victim's physical appearance and reactions while recounting the alleged abuse "'validat[ed]'" the victim's account of the abuse. The court said that testimony concerning the profile of a child abuse victim is admissible to explain certain behaviors and to rebut the implied or express defense assertion that the child is lying. "However, when the testimony goes beyond explaining the child's behavior . . . and asserts, directly or indirectly, that

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<sup>41</sup> John E.B. Myers, *Myers on Evidence of Interpersonal Violence: Child Maltreatment, Intimate Partner Violence, Rape, Stalking, and Elder Abuse* § 6.21 (2012).

<sup>42</sup> *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992).

<sup>43</sup> *Id.* at 39, 486 N.W.2d at 204.

<sup>44</sup> *Id.*

<sup>45</sup> *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

<sup>46</sup> *Id.*

<sup>47</sup> *State v. Doan*, 1 Neb. App. 484, 488, 498 N.W.2d 804, 807 (1993).

the child has in fact been abused or that the child is telling the truth, then many courts hold that such evidence goes too far.”<sup>48</sup> The Court of Appeals concluded that in light of the current state of social science research and the case law, an expert has neither the legal authority nor the scientific qualifications to opine as to the truthfulness of the statement of another witness.<sup>49</sup> Therefore, “in a prosecution for sexual assault of a child, an expert witness may not give testimony which directly or indirectly expresses an opinion that the child is believable, that the child is credible, or that the witness’ account has been validated.”<sup>50</sup>

No one now disputes that Gobel’s testimony impermissibly vouched for M.H.’s credibility. Nevertheless, it appears that in her exuberance or lack of familiarity with the relevant case law, the prosecutor believed Gobel’s testimony was admissible because it explained the basis for M.H.’s PTSD. As the prosecutor had predicted in the hearing on the motion in limine, Gobel never *directly* testified that M.H. was telling the truth.

Importantly, the trial court agreed with the prosecutor’s theory of admissibility. During the sidebar at trial, the court opined that asking Gobel what “event” led to M.H.’s PTSD was not improper vouching. It is difficult to conclude that the prosecutor intended to force a mistrial by invoking testimony that the court had expressly deemed admissible.<sup>51</sup>

We further note that after this testimony was adduced, the prosecutor expressed concern with avoiding trial error. The prosecutor was careful to clarify with the court what might be proper comment on this testimony during closing argument. The prosecutor said she would “make sure we don’t say it wrong in the argument.” Oral arguments were not transcribed,

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<sup>48</sup> *Id.* at 490-91, 498 N.W.2d at 809.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 496, 498 N.W.2d at 812. See, also, *State v. Maggard*, 1 Neb. App. 529, 502 N.W.2d 493 (1993).

<sup>51</sup> See, e.g., *State v. Bostwick*, *supra* note 2.

but Muhannad does not argue that the prosecutor failed to carry out the court's directives. It appears from the record that the prosecutor throughout the trial attempted to avoid committing any errors. This, again, runs contrary to an intent to provoke a mistrial.

But even if we could somehow conclude that the prosecutor knew the question was improper and that the trial court was wrong in allowing it, it would not follow that the prosecutor was engaging in a plan to provoke a mistrial at Muhannad's behest. Besides the inherent illogic to such a plan of pursuing a mistrial based upon the admission of the very evidence the court repeatedly deemed admissible, other objective factors support the inference that the prosecutor did not intend to goad Muhannad into moving for a mistrial.

There was no pattern of misconduct during this trial. If this was prosecutorial misconduct, it was, at most, an isolated incident. The record does not reflect whether the prosecutor was surprised by the motion, but presumably so, since—again—the court had indicated at all times that the prosecutor was acting correctly. The prosecutor strongly resisted the motion for mistrial once it was made.

Finally, as the trial court indicated, the progression of the trial appeared to be in the State's favor and there would have been little to gain in provoking a mistrial. We find no clear error in this conclusion. Muhannad points out the lack of physical evidence and the various defense theories presented at trial, but he points to nothing atypical for a child sexual abuse prosecution. There is no indication that a second trial would go differently. As the trial court said, there would be no tactical advantage in provoking a mistrial.

In summary, the record supports the trial court's finding that the prosecutor did not intend to provoke a mistrial. This was not a "Machiavellian situation where the prosecutor deliberately courts a mistrial."<sup>52</sup> Indeed, defense counsel did not argue at the hearing on the plea in bar an actual intent to goad

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<sup>52</sup> *Fields v. State*, *supra* note 24, 96 Md. App. at 744, 626 A.2d at 1048.

Muhannad into moving for a mistrial. He instead focused on gross negligence. And gross negligence is insufficient under the narrow exception set forth in *Oregon v. Kennedy*.

Because the prosecutor did not intend to goad Muhannad into moving for a mistrial, Muhannad maintained primary control over the course of events following Gobel's testimony. Muhannad chose to waive the right to have his trial completed by a particular tribunal, and his plea in bar was properly denied.

### CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court denying the plea in bar.

AFFIRMED.

HEAVICAN, C.J., not participating in the decision.

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KEYVYN A. GUINN ET AL., TRUSTEES OF THE TRUSTS CREATED  
UNDER THE BERNARD M. O'DANIEL REVOCABLE TRUST  
AGREEMENT DATED OCTOBER 22, 1998, AS AMENDED BY  
FIRST AMENDMENT TO THE BERNARD M. O'DANIEL  
REVOCABLE TRUST AGREEMENT DATED MARCH 28, 2001,  
AND PERSONAL REPRESENTATIVES OF THE ESTATE OF  
BERNARD M. O'DANIEL, DECEASED, AND ELIZABETH  
M. O'DANIEL, APPELLANTS AND CROSS-APPELLEES,  
V. ROBERT J. MURRAY AND LAMSON, DUGAN  
& MURRAY, LLP, A NEBRASKA LIMITED  
LIABILITY PARTNERSHIP, APPELLEES  
AND CROSS-APPELLANTS.  
837 N.W.2d 805

Filed September 27, 2013. No. S-12-165.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. \_\_\_\_: \_\_\_\_\_. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was

granted and gives that party the benefit of all reasonable inferences deducible from the evidence.

3. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
5. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
6. **Limitations of Actions: Malpractice.** If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law.
7. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
8. **Limitations of Actions: Negligence: Torts.** In a negligence action, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. This principle has been referred to as "the occurrence rule."
9. **Limitations of Actions: Negligence.** A claim for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the claim.
10. **Limitations of Actions: Damages.** A statute of limitations may begin to run at some time before the full extent of damages has been sustained.
11. **Limitations of Actions: Negligence.** If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the exceptions of Neb. Rev. Stat. § 25-222 (Reissue 2008).
12. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress. It is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed.
13. **Limitations of Actions: Malpractice.** In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action.

14. **Malpractice: Damages: Words and Phrases.** In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss. Legal injury is not damage; damage is the loss resulting from the misconduct.
15. **Limitations of Actions: Malpractice.** Under the continuous representation rule, the statute of limitations for a claim of professional negligence is tolled if there is a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.
16. \_\_\_\_: \_\_\_\_\_. Continuity does not mean mere continuity of the general professional relationship, and the continuous representation rule is inapplicable when the claimant discovers the alleged negligence prior to the termination of the professional relationship.
17. **Summary Judgment: Appeal and Error.** The denial of a summary judgment motion is neither appealable nor reviewable.
18. **Summary Judgment: Moot Question: Appeal and Error.** Whether a motion for summary judgment should have been granted generally becomes moot after trial. This is because the overruling of such a motion does not decide any issue, but merely indicates that the trial court was not convinced that the moving party was entitled to judgment as a matter of law. After trial, the merits should be judged in relation to the fully developed trial record, not whether a different judgment may have been warranted on the record at summary judgment.
19. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.
20. **Malpractice: Attorney and Client.** In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances.
21. \_\_\_\_: \_\_\_\_\_. Although the general standard of an attorney's conduct is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact.
22. **Attorney and Client: Expert Witnesses.** Expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith.
23. **Summary Judgment: Expert Witnesses: Testimony.** A conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

W. Patrick Betterman and Lindsay E. Pedersen, of Law Offices of W. Patrick Betterman, for appellants.

James M. Bausch and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

HEAVICAN, C.J., CONNOLLY, and STEPHAN, JJ., and IRWIN, Judge.

PER CURIAM.

### NATURE OF CASE

In this legal malpractice case, clients sued an attorney and his firm alleging professional negligence in connection with the administration of an estate. The clients, who are relatives of the decedent, Bernard M. O'Daniel, appeal. The attorney and law firm, Robert J. Murray and Lamson, Dugan & Murray, LLP, cross-appeal. For the reasons explained below, we affirm the judgment entered in favor of Murray and the firm on the clients' claim that they failed to properly disclose a conflict of interest, and we reverse the judgments entered dismissing as time barred the clients' claims regarding the propriety of advice regarding disclaiming certain property and associated tax return elections. We remand the cause for further proceedings on these two claims. Murray and the firm cross-appeal regarding a preliminary ruling made on August 22, 2011, and we find no merit to the assignment of error in the cross-appeal.

### STATEMENT OF FACTS

The appellants and cross-appellees in this case are Bernard's widow, Elizabeth M. O'Daniel, and three of Bernard's six surviving children, Kevyne A. Guinn, Michael F. O'Daniel, and Maureen E. Toberer. The children are parties to this case in their capacities as personal representatives of Bernard's estate and as trustees of trusts created by Bernard. The appellants and cross-appellees are hereinafter collectively referred to as "the O'Daniels."

The O'Daniels filed a professional malpractice action against Murray and his law firm, Lamson, Dugan & Murray, on June 12, 2006. The name "Murray" is used herein to refer both to Murray individually and to the defendants collectively now appearing as appellees and cross-appellants. The O'Daniels generally alleged that Murray committed professional negligence with regard to the administration of Bernard's estate and

that such negligence caused the estate to incur additional estate taxes and additional legal fees.

After Bernard died in July 2001, Murray met with Bernard's children to discuss estate matters. Murray also represented O'Daniel Motor Center (ODMC), the stock of which was a significant asset of Bernard's estate. At the first meeting, Murray advised the children of his representation of both ODMC and the estate and told them he could be fair to all parties but encouraged them to retain their own counsel if they so desired.

As part of the estate administration, Murray advised the O'Daniels that Elizabeth should disclaim her interest in a portion of Bernard's estate, including his ODMC stock, so that such interest would instead be distributed to the children. Murray's advice included plans for ODMC to purchase or redeem the stock that would pass to the children other than Michael, who would be left in control of the ODMC business. Murray advised the children regarding the disclaimer option at the initial meeting after Bernard's death in July 2001 and in subsequent communications in September, October, and November 2001. In materials provided to the children, Murray's calculations indicated that if some of the property passed directly to the children from Bernard's estate rather than passing through Elizabeth's estate before eventually passing to the children, there could be overall estate tax savings to the family, because some of the property that would eventually pass to the children would be subject to tax in Bernard's estate rather than leaving all of the property to be subject to tax in Elizabeth's estate. The materials indicated that if Elizabeth did not disclaim any property, Bernard's estate would pay no tax and Elizabeth's estate would pay tax on the entire estate; the materials further indicated that if Elizabeth did disclaim a portion of the property, both Bernard's estate and Elizabeth's estate would pay tax but that the combined tax would be less than if the entire estate were taxed in Elizabeth's estate. One of the stated assumptions in Murray's calculation of potential estate tax savings was that Elizabeth was not expected to live past December 31, 2003.

In 1998, Elizabeth had executed a power of attorney naming two of the children, Guinn and Michael, as coattorneys in fact. The power of attorney stated that the attorney in fact had authority to “deal with [her] real or personal property in any manner that [the attorney in fact] may deem appropriate.” The power of attorney further stated that such authority included but was not limited to certain specified powers which included, *inter alia*, the “[p]ower to make gifts or execute documents and instructions in furtherance of my estate plan or which may otherwise be advantageous for estate and gift tax planning purposes.” In November and December 2001, Guinn and Michael executed disclaimers on Elizabeth’s behalf disclaiming her interest in the ODMC stock and in a portion of a promissory note from ODMC to Bernard.

The estate was eligible to make a qualified terminable interest property (QTIP) election on its estate tax return. The QTIP election allowed the estate to shield from tax the property that passed to a marital trust for the benefit of Elizabeth. Murray prepared the estate tax return which was signed by the personal representatives and filed on April 9, 2002. When preparing the return, Murray excluded the disclaimed property from the QTIP election. Based on the assumption that the disclaimers were effective, Murray determined that the disclaimed property would not pass to the marital trust and therefore was not eligible for the QTIP election. The result was that the disclaimed property was subject to estate tax, and the estate owed over \$600,000 in federal and state estate taxes.

In 2003, the Internal Revenue Service (IRS) began an audit of the estate’s return. While the audit was underway, some of the O’Daniels were concerned with Murray’s handling of the estate and consulted with other attorneys. The O’Daniels assert that they first learned in March 2004 that the disclaimers were not valid. Based on the advice of new attorneys, the O’Daniels believed that the disclaimers were not valid because Guinn and Michael, who signed the disclaimers using Elizabeth’s power of attorney, stood to benefit from the disclaimers and therefore were not authorized under the power of attorney to execute the disclaimers. They further believed that the disclaimers were

not effective to achieve their intended purpose because under Bernard's will, his assets were to be distributed to a trust that would benefit Elizabeth rather than to Elizabeth herself and therefore Elizabeth had no interest to disclaim. On April 6, 2004, the O'Daniels and Murray signed a tolling agreement that tolled the running of the statute of limitations with respect to any legal malpractice claims that could have been timely brought prior to that date.

In 2005, the O'Daniels took steps to undo the distribution of property that had been made based on Murray's advice regarding the disclaimers. They also filed a claim for a refund of estate taxes on the basis that because the purportedly disclaimed property was not validly disclaimed, it should have passed to the marital trust for Elizabeth and therefore should have been included in the QTIP election and should not have been subject to estate tax. The IRS denied the requested change. The steps the O'Daniels undertook caused them to incur additional legal fees and related expenses.

The O'Daniels filed this malpractice action against Murray on June 12, 2006. The claims they made in their complaint have been treated in these proceedings as consisting of three general claims of professional negligence: (1) Murray failed to obtain the O'Daniels' informed consent with regard to the conflict of interest in his dual representation of ODMC and Bernard's estate, (2) Murray erroneously advised the O'Daniels to execute disclaimers that should be regarded as invalid and ineffective, and (3) Murray failed to include the purportedly disclaimed property in the QTIP election and therefore caused the estate to incur additional taxes.

After numerous proceedings, motions, hearings, and two trials, the district court resolved all the claims. At issue with respect to each claim was whether the claim was barred by the 2-year statute of limitations for professional negligence actions under Neb. Rev. Stat. § 25-222 (Reissue 2008) as of April 6, 2004, when the parties signed the tolling agreement. It was ultimately determined that each of the claims was barred by the statute of limitations. However, such conclusion was reached as to each claim by a different procedural route—the conflict of interest issue was determined based on

a jury trial, the adequacy of advice regarding the disclaimers issue was resolved based on a motion for summary judgment, and the QTIP election issue was resolved based on a motion for directed verdict after a second jury trial ended in a mistrial.

With regard to the claim that Murray did not obtain consent to the dual representation, the district court rejected Murray's motion for summary judgment based on the statute of limitations. The court originally determined in an order filed March 3, 2011, that although Murray disclosed the dual representation in July 2001 and the O'Daniels knew at that time that there was a conflict of interest, the O'Daniels did not then know that Murray had failed to obtain adequate consent to the dual representation and they did not discover such failure until after the original limitations period had expired. After the parties renewed their motions for summary judgment, the court determined in an order filed April 11, 2011, that contrary to the court's prior order, there were issues of material fact regarding whether the O'Daniels were on notice during the limitations period that Murray had failed to obtain adequate consent. The court therefore granted Murray's motion for a separate trial to a jury on the statute of limitations issue with respect to the conflict of interest claim. At the conclusion of the trial on the conflict of interest claim, the jury returned a verdict in favor of Murray on the statute of limitations defense. The court entered judgment based on the jury's verdict.

With regard to the claim that Murray erroneously advised the O'Daniels with respect to the disclaimers, the court concluded in response to Murray's motion for summary judgment that the claim was barred by the statute of limitations. In the initial March 3, 2011, order, the court found that the statute began to run when the disclaimers were executed in November and December 2001 and that neither the discovery rule nor the continuous representation rule applied to toll the statute of limitations. The court noted Guinn's deposition testimony that the tax liability reported on the estate's return in April 2002 was greater than what she expected the estate would have to pay. The court reasoned that the knowledge of "a higher tax liability put [the O'Daniels] on inquiry notice that the disclaimers did

not work as intended.” Because the O’Daniels were on inquiry notice in April 2002, which was within 2 years after the alleged negligence occurred in late 2001, the discovery rule did not toll the statute of limitations. The court further reasoned that Murray’s representation of the estate during the IRS audit was not an attempt to reverse the unfavorable results of his advice regarding disclaimers and that therefore, the continuous representation rule did not toll the statute of limitations. The court concluded that the 2-year statute of limitations had run and that the claim was barred in 2003, before the parties executed the tolling agreement on April 6, 2004. The court granted summary judgment in favor of Murray on this claim.

Although the court concluded that the disclaimer advice claim was barred by the statute of limitations, “for the sake of thoroughness,” the court addressed the merits of the O’Daniels’ assertions that the disclaimers were not effective or valid. In the initial March 3, 2011, order, the court concluded, *inter alia*, that the disclaimers were invalid because although the power of attorney executed by Elizabeth gave the attorneys in fact the authority to make gifts for tax planning purposes, it did not specifically grant her attorneys in fact the power to make gifts to themselves.

With regard to the claim that Murray failed to make a QTIP election for the purportedly disclaimed property, a jury trial was scheduled on issues related to the claim. Prior to that trial, the court, in an order entered August 22, 2011, made various rulings in response to the O’Daniels’ motion for partial summary judgment. These included a ruling that “it should have been clear that the Disclaimers were invalid and the purportedly disclaimed property must be included in the QTIP election.” The substance of this aspect of the August 22 ruling is challenged by Murray on cross-appeal.

A trial was conducted and resulted in a mistrial when the jury was unable to reach a verdict. The court thereafter considered the parties’ motions for directed verdict and concluded that Murray was entitled to a directed verdict because the claim for failure to make the QTIP election for the purportedly disclaimed property was barred by the statute of limitations.

In an order filed February 1, 2012, the court reasoned that although the estate tax return was filed on April 9, 2002, which date was within 2 years prior to the date of the tolling agreement on April 6, 2004, the filing of the return was not the wrongful act at issue. Instead, the court found that “the wrongful act forming the basis of this claim actually occurred in 2001 when Murray provided the erroneous advice with respect to the disclaimers.” The court cited an Arkansas case in which the Arkansas Supreme Court determined that the professional malpractice statute of limitations began to run when an accountant gave erroneous advice and not when he later completed a tax return in accordance with such advice. The court in this case noted that at the time the estate tax return was filed, Murray acted on the assumption that the disclaimers were valid and therefore determined that the property was not eligible for the QTIP election. The court concluded that for the same reasons the claim for negligent advice regarding the disclaimers was barred, the claim for failure to make the QTIP election was also barred by the statute of limitations.

The court further found that even if the claim was not barred by the statute of limitations, the O’Daniels failed to establish a *prima facie* case of legal malpractice because they failed to introduce evidence at trial showing that Murray’s negligence was the proximate cause of their damages. The court stated that although the O’Daniels presented evidence that the estate paid taxes of over \$600,000, such evidence alone was “insufficient to lead to an inference that that amount was the result of negligence on the part of Murray” and that “there was no evidence indicating that the Estate would not have had to pay the same amount had Murray included the purportedly disclaimed property in the QTIP election.” The court concluded that because the O’Daniels “failed to introduce any evidence for which the jury could determine proximate cause and damages,” Murray was entitled to judgment as a matter of law. The court therefore sustained Murray’s motion for directed verdict and entered judgment in Murray’s favor on the QTIP election claim.

The O’Daniels appeal, and Murray cross-appeals.

### ASSIGNMENTS OF ERROR

The O'Daniels generally claim that the district court erred when it concluded that their claims were barred by the statute of limitations. The O'Daniels make additional assignments of error that because of our disposition of this appeal, we need not reach.

On cross-appeal, Murray refers us to the following language in the August 22, 2011, order that "it should have been clear that the Disclaimers were invalid and the purportedly disclaimed property must be included in the QTIP election" and, rephrased, asserts on cross-appeal that in the event of a remand, given this ruling, the district court improperly removed the issue of fact as to whether Murray's conduct fell below the standard of conduct with respect to the disclaimer advice from the jury's consideration.

### STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Shada v. Farmers Ins. Exch.*, ante p. 444, 840 N.W.2d 856 (2013). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

[4] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Credit Bureau Servs. v. Experian Info. Solutions*, 285 Neb 526, 828 N.W.2d 147 (2013).

[5-7] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). If the facts in a case are undisputed, the issue as to when the professional negligence statute of limitations began to run is a question of law. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006). An appellate court independently reviews questions of law decided by a lower court. *Shada v. Farmers Ins. Exch.*, *supra*.

## ANALYSIS

As tried in the district court, this malpractice action involves three claims: (1) that Murray failed to obtain consent with regard to a conflict of interest, (2) that Murray erroneously advised the O'Daniels to execute disclaimers that were invalid and ineffective, and (3) that Murray's failure to include disclaimed property in the QTIP election caused the estate to incur unnecessary taxes. The O'Daniels make various assignments of error which relate to one or more of the claims; in our analysis, we consider in turn each of the three claims and the assignments of error related to each claim. The district court ultimately resolved each of the claims in this action by concluding that the claim was barred by the statute of limitations, and we generally resolve this appeal by deciding issues related to the statute of limitations. We therefore begin our analysis with a review of statute of limitations concepts that are applicable to all three legal malpractice claims before we consider each claim separately.

*Statute of Limitations Concepts  
Applicable to the O'Daniels'  
Three Claims.*

Each of the O'Daniels' claims is a legal malpractice claim, and therefore, the applicable statute of limitations is § 25-222, which provides:

Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

Under the statute, the action must be commenced within 2 years of the alleged act of negligence unless the action was not or could not reasonably be discovered within that 2-year period, in which case it must be commenced within 1 year after it is discovered or should be discovered.

[8-10] In a negligence action, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs. *Carruth v. State*, *supra*. This principle has been referred to as “the occurrence rule.” *Id.* at 438, 712 N.W.2d at 580. A claim for professional negligence accrues and the statute of limitations begins to run at the time of the act or omission which is alleged to be the professional negligence that is the basis for the claim. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). A statute of limitations may begin to run

at some time before the full extent of damages has been sustained. *Id.*

In the present case, the statute of limitations analysis focuses on April 6, 2004, when the parties signed a tolling agreement to the effect that the statute would be tolled for any action that was not already barred as of that date. Therefore, any claim on which the limitations period had not run prior to April 6, 2004, was not barred when the O'Daniels filed their complaint on June 12, 2006. Under § 25-222, a claim was barred if it had accrued prior to April 6, 2002, unless the discovery rule applied or the statute was tolled for another reason.

[11] If a claim for professional negligence is not to be considered time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the exceptions of § 25-222. *Bellino v. McGrath North, supra*. The O'Daniels in this case argue that both the discovery rule and the continuous representation rule toll the running of the statute of limitations on their claims.

[12-14] The discovery rule as it pertains to professional negligence claims is set forth in §25-222, quoted above. By the terms of the statute, the discovery rule applies only when the cause of action is not discovered and could not reasonably have been discovered within the 2-year limitations period. If the discovery rule applies, then the limitations period is 1 year from the time the cause of action is or could have been discovered. "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that one has a legal right to seek redress. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). It is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed. *Id.* In a professional negligence case, "discovery of the act or omission" occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the knowledge of facts constituting the basis of the cause of action. *Gering - Ft. Laramie Irr. Dist. v. Baker*, 259 Neb. 840, 612 N.W.2d 897 (2000). In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss.

*Id.* Legal injury is not damage; damage is the loss resulting from the misconduct. See *id.*

[15,16] This court has also recognized that the continuous representation rule may toll the statute of limitations in a legal malpractice case. Under this rule, the statute of limitations for a claim of professional negligence is tolled if there is a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). However, we have limited the reach of the continuous representation rule by stating that continuity does not mean mere continuity of the general professional relationship and that the continuous representation rule is inapplicable when the claimant discovers the alleged negligence prior to the termination of the professional relationship. See *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999).

We review statute of limitations issues regarding the O'Daniels' three claims in the context of the standards set forth above.

#### *Conflict of Interest Claim.*

We first consider the claim that Murray committed legal malpractice when he failed to obtain the O'Daniels' informed consent with regard to the conflict of interest in his dual representation of ODMC and the estate. The O'Daniels' primary contention on appeal with respect to this claim is that the district court erred when it failed to grant summary judgment in their favor on the substance of this claim. After the district court denied the summary judgment about which the O'Daniels complain, the case proceeded to trial. The jury found this claim to be time barred, and the district court entered judgment accordingly. We affirm.

The conflict of interest claim involves Murray's alleged failure to obtain consent to the dual representation, which consent should have been obtained when Murray began the dual representation in July 2001. Unless the discovery rule applied or the statute was tolled, the 2-year limitations period under § 25-222 ended for this claim in 2003, before the parties executed the tolling agreement on April 6, 2004.

At issue in the district court was whether the O'Daniels discovered or could have discovered their cause of action before the 2-year limitations period ended in 2003. The court twice considered cross-motions for summary judgment with respect to the conflict of interest claim before it ultimately submitted the statute of limitations issue to a jury. The court was initially of the view that the O'Daniels did not discover that Murray had failed to obtain adequate consent to the dual representation until after the expiration of the original 2-year limitations period. The court later determined that contrary to its prior order, there were issues of material fact regarding whether the O'Daniels were put on notice during the limitations period that Murray had failed to obtain informed consent; the court noted in its order that if the O'Daniels were on inquiry notice of the claim during the original limitations period, neither the discovery rule nor the continuous representation rule tolled the limitations period. The statute of limitations issue pertaining to the conflict of interest claim was submitted to a jury, and the jury returned a verdict in favor of Murray based on the statute of limitations. The court entered judgment based on the jury's verdict.

[17,18] On appeal, the O'Daniels claim that the district court erred when it denied their motions for summary judgment on the conflict of interest claim. This assignment of error focuses on the summary judgment ruling but ignores the fact that the statute of limitations issue was later tried to a jury, and on the complete record made at trial, the jury found in Murray's favor. We have held that the denial of a summary judgment motion is neither appealable nor reviewable. *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012). We have further stated that whether a motion for summary judgment should have been granted generally becomes moot after trial. This is because the overruling of such a motion does not decide any issue, but merely indicates that the trial court was not convinced that the moving party was entitled to judgment as a matter of law. After trial, the merits should be judged in relation to the fully developed trial record, not whether a different judgment may have been warranted on the record at summary judgment. *Id.* We therefore do not review the O'Daniels' claims

that the court erred when it denied motions for summary judgment that the O'Daniels made before the jury trial.

For completeness, we note the O'Daniels generally assert that the court erred when it entered judgment in favor of Murray on the conflict of interest claim; however, they make no assignment of error related to a specific ruling made by the court during the trial. They generally argue that the discovery rule or the continuous representation rule extended the limitations period, without acknowledging that the jury by its verdict implicitly rejected these assertions. The jury found against the O'Daniels and in favor of Murray on the statute of limitations issue, and the court entered judgment in favor of Murray on the conflict of interest claim based on the jury's verdict. We see no error in the court's entering judgment based on such verdict. Because the O'Daniels assign no reviewable error with respect to the trial that resulted in such verdict, we affirm the judgment entered in favor of Murray on the conflict of interest claim.

*Disclaimer Advice Claim.*

The O'Daniels claim that the district court erred when it granted summary judgment in favor of Murray on the disclaimer advice claim based on the court's determination that this claim was discovered in April 2002, when Bernard's estate tax return was completed, and that the claim was therefore barred by the statute of limitations. Upon our appellate review, the summary judgment record infers that the statute of limitations was extended by the discovery rule, and we must take the reasonable inferences in favor of the O'Daniels as the party against whom judgment was granted. See *Shada v. Farmers Ins. Exch.*, ante p. 444, 840 N.W.2d 856 (2013). We therefore agree with the O'Daniels that the court erred when it determined on summary judgment that the claim was barred by the statute of limitations. We reverse the grant of summary judgment in favor of Murray and remand the cause for further proceedings with respect to this claim.

The disclaimer advice claim generally concerns Murray's advice regarding the plan for Elizabeth to disclaim property. The O'Daniels alleged in their complaint that Murray's advice

regarding the execution of disclaimers “was negligent and deviated from the standard of care observed by attorneys practicing law in Omaha, Nebraska in 2001.” They alleged that the advice was deficient for various reasons, including errors in Murray’s tax savings computations. They also alleged the disclaimers were ineffective to achieve the intended result because under the terms of Bernard’s will, property would pass to a trust for Elizabeth’s benefit rather than to Elizabeth herself, and therefore the disclaimers would not affect the passing of such property to the trust. They further alleged that the disclaimers were ineffective because the holders of Elizabeth’s power of attorney would receive a share of the property disclaimed by Elizabeth, which was contrary to the law providing that the holder of a power of attorney could not make a gift to himself or herself unless the power of attorney specifically so provided.

Murray gave the challenged advice regarding disclaimers, and the plan was carried out with the execution of disclaimers in the second half of 2001. The negligent acts alleged in this claim occurred in 2001, and therefore, unless the discovery rule or the continuous representation rule applied, the disclaimer advice claim was barred by the 2-year statute before the parties executed the tolling agreement on April 6, 2004.

In an order entered March 3, 2011, the district court concluded, *inter alia*, that this claim accrued in 2001 and was barred by the 2-year statute of limitations before the tolling agreement was executed in 2004. The court concluded that neither the discovery rule nor the continuous representation rule applied to toll the statute. With regard to the discovery rule, the court concluded that the O’Daniels were put on inquiry notice of the disclaimer claim prior to the expiration of the limitations period when in April 2002 they learned that the estate taxes were higher than expected. With regard to the continuous representation rule, the court concluded that Murray’s representation of the estate during the IRS audit was not an attempt to reverse purportedly unfavorable results of his advice regarding the disclaimers and that therefore, the continuous representation rule did not apply because it was not representation with regard to the same matter.

We disagree with the district court's determination that learning of the higher tax liability put the O'Daniels on inquiry notice of the disclaimer advice claim. In making this determination, the court relied on Guinn's testimony that the tax liability reported on the estate's return in April 2002 was greater than what she expected it would be. From this comment, the district court determined that the O'Daniels were put on inquiry notice of problems with the disclaimer advice. The district court's analysis fails to incorporate the evidence with respect to how Murray's tax planning advice was expected to work.

The disclaimer plan set forth by Murray was always expected to result in a higher estate tax being paid in Bernard's estate but a lower overall estate tax being paid with regard to both Bernard's and Elizabeth's estates. In effect, the plan was that some estate tax would be paid in Bernard's estate in order to save a greater amount of estate tax in Elizabeth's estate. If the disclaimers were ineffective, then the property would have gone to the trust to benefit Elizabeth and the property would have been included in the QTIP election, resulting in less tax than what the O'Daniels expected based on the plan set forth by Murray. The evidence showed that the taxes were higher than Guinn expected generally because of an unrelated issue involving a grandchild's inheritance rather than the allegedly erroneous disclaimer advice. Therefore, when Guinn learned that taxes were higher than she expected (due to an unrelated issue), such knowledge did not give the O'Daniels inquiry notice of a possible problem with the disclaimer advice. If the O'Daniels had inquired into the cause of the increased taxes in April 2002, such inquiry would have led them to discover the unrelated issue that caused taxes to be higher than originally estimated but would not have led them to discover the alleged problems with the disclaimer advice.

The only other evidence bearing on discovery of the disclaimer advice appears to indicate that the O'Daniels did not discover possible problems with the disclaimer advice until early 2004, when other attorneys told them that the disclaimers were not valid or effective. The original 2-year limitations period on the disclaimer advice claim ended in 2003.

Therefore, if discovery occurred in early 2004, it occurred after the end of the original limitations period; and under § 25-222, the O'Daniels had 1 year from the date of discovery to bring an action on their claim. The tolling agreement was signed in April 2004, within 1 year after the O'Daniels discovered their claim in early 2004 as a result of consultation with other attorneys. The evidence regarding higher taxes and the comments of other attorneys fails to indicate that the O'Daniels discovered or should have discovered potential problems with the disclaimer advice before early 2004. Thus, on the summary judgment record, the O'Daniels benefit from the discovery rule. Because we conclude that the discovery rule applied, we need not consider whether the continuous representation rule also applied.

The ruling under consideration was made on Murray's motion for summary judgment, and we must take the reasonable inferences in favor of the O'Daniels as the party against whom judgment was granted. See *Shada v. Farmers Ins. Exch.*, ante p. 444, 840 N.W.2d 856 (2013) (appellate court views evidence in light most favorable to party against whom judgment was granted and gives that party benefit of all reasonable inferences). Taking inferences in favor of the O'Daniels, we determine that Murray did not show that the disclaimer advice claim was barred by the statute of limitations and that judgment should be entered in Murray's favor. The district court erred when it determined this claim was time barred and granted summary judgment in favor of Murray on the disclaimer advice claim. We therefore reverse the grant of summary judgment in favor of Murray, and we remand the cause to the district court for further proceedings on the disclaimer advice claim.

#### *QTIP Election Claim.*

The O'Daniels claim that the district court erred when it determined that the QTIP election claim was time barred and granted a directed verdict in favor of Murray. We agree with the O'Daniels, and we reverse the grant of a directed verdict and remand the cause to the district court for further proceedings on the QTIP election claim.

The O'Daniels alleged in their complaint that Murray negligently failed to include the purportedly disclaimed property in the QTIP election on the estate's tax return and that as a result of such failure, the estate was denied a marital deduction for the value of the property and that the estate incurred and paid estate taxes that would not have been incurred if the property had been included in the QTIP election. Although this claim was presented to a jury, the jury was unable to reach a verdict, resulting in a mistrial. The court then considered the parties' motions for directed verdict and concluded that the claim was barred by the statute of limitations. The court determined that the filing of the estate tax return in April 2002 was not the wrongful act at issue and that instead, the manner in which the return was prepared was merely a result of the allegedly erroneous disclaimer advice that Murray gave in 2001. The court further found that even if the claim was not barred, the O'Daniels had failed to introduce evidence at trial to show that Murray's negligence was the proximate cause of their damages; that is, the O'Daniels failed to show that they would not have had to pay the amount of estate taxes incurred if Murray had included the disclaimed property in the QTIP election.

With regard to the QTIP election claim, the O'Daniels assert that the act giving rise to the claim accrued on April 9, 2002, when Murray filed the estate tax return, and that therefore, the tolling agreement occurred within 2 years thereafter, thus within the limitations period. Murray argues, and the district court determined, that the claim did not accrue upon the filing of the estate tax return; instead, the filing of the return was merely a consequence of the allegedly negligent disclaimer advice given in 2001. The district court concluded that this claim accrued at the time the advice was given in 2001 and that therefore, the limitations period was over before the signing of the tolling agreement on April 6, 2004.

Regardless of whether we agree with Murray's contention and the court's conclusion that the QTIP election claim was merely a result of the allegedly erroneous disclaimer advice or whether we agree with the O'Daniels' contention that they asserted a separate claim that accrued only upon completion of

the estate return, we nevertheless conclude that the claim was not barred by the statute of limitations. If the O'Daniels' claim with regard to the QTIP election was a separate claim, then it accrued upon the filing of the return on April 9, 2002, and the 2-year limitations period under § 25-222 had not run when the tolling agreement was executed on April 6, 2004. If the QTIP election claim was merely a result of the allegedly erroneous disclaimer advice, then, similar to our reasoning above with respect to the disclaimer advice claim, on the record before us, the O'Daniels did not discover the QTIP election claim until early 2004 and the QTIP election claims also was not barred by the statute of limitations.

When it granted the directed verdict in favor of Murray, the court also concluded that even if the QTIP election claim was not barred by the statute of limitations, the O'Daniels did not prove any damages that were proximately caused by Murray's alleged negligence. However, the district court's conclusion in this respect appears to be influenced by the fact that the court was considering the QTIP election claim in isolation. Given the procedural posture of the claims and because we have determined on the record before us that neither the disclaimer advice claim nor the QTIP election claim was conclusively barred by the statute of limitations, the two claims must be considered together on remand, and we consider the court's conclusion with regard to damages in light of both claims.

In determining that the QTIP election claim was barred by the statute of limitations, the court determined that the claim was merely a consequence of the disclaimer advice claim—in effect, that the exclusion of the “purportedly” disclaimed property from the QTIP election was merely the result of the disclaimer advice. However, in concluding that the O'Daniels provided no evidence of damages, the court apparently looked at the QTIP election claim in isolation and concluded that there was no evidence of damages because the estate taxes were not a result of Murray's excluding the property from the QTIP election when such exclusion was required by the fact the property had been disclaimed.

Considering the claims together, the testimony of O'Daniels' experts indicates that if Murray had not given the allegedly

erroneous disclaimer advice, then the property would not have been disclaimed and it would have been eligible to be included in the QTIP election, thereby avoiding estate tax on that property in Bernard's estate. The O'Daniels also asserted that they incurred additional attorney fees in an attempt to undo the problems caused by Murray's disclaimer advice and his failure to make a QTIP election on the property that should not have been disclaimed. The district court's conclusion that the O'Daniels presented no evidence of damages was made in the context of a trial limited to the QTIP election. On remand, the disclaimer advice claim and the QTIP election claim should be considered together and evidence of damages should be considered as a result of both claims.

We conclude that the district court erred when it directed a verdict in favor of Murray on the QTIP election claim. We reverse such directed verdict, and we remand the cause for further proceedings on the QTIP election claim in conjunction with further proceedings on the disclaimer advice claim.

*The O'Daniels' Remaining  
Assignments of Error.*

The O'Daniels' remaining assignments of error relate to evidentiary rulings and other matters arising from the jury trial on the QTIP claim which resulted in a mistrial. We have reversed the court's grant of a directed verdict on this claim and remanded the cause for further proceedings, and we need not address these issues in order to resolve this appeal. Although some of these issues may recur, the rulings of which the O'Daniels complain in their remaining assignments of error arose in the context of a trial that involved only the QTIP election claim. On remand, the court will likely be faced with a different set of circumstances because any proceedings that may occur on remand will also involve the disclaimer advice claim. If the same issues arise on remand, rulings on the issues will arise in a much different context on remand than the context in which they were originally decided. Any consideration of the issues in the context of the previous trial would not necessarily be dispositive on remand. We therefore do not consider the O'Daniels' remaining assignments of error.

*Murray's Cross-Appeal.*

On cross-appeal, Murray refers us to the following language in the August 22, 2011, order that “it should have been clear that the Disclaimers were invalid and the purportedly disclaimed property must be included in the QTIP election” and, rephrased, asserts on cross-appeal that in the event of a remand, given this ruling, the district court improperly removed from the jury’s consideration the issue of fact as to whether Murray’s conduct fell below the standard of conduct with respect to the disclaimer advice. Because we are remanding the cause for further proceedings regarding the disclaimer advice claim and the QTIP election claim, this issue will likely recur on remand and the court’s ruling could be relevant to issues on remand. Although we do not find merit to Murray’s assignment of error, we nevertheless consider Murray’s cross-appeal in order to set forth standards that should be applied on remand and that should inform how the analysis by the district court should proceed in further proceedings.

In an order entered August 22, 2011, prior to the trial on the QTIP election claim, the district court addressed the O’Daniels’ third motion for partial summary judgment. The O’Daniels had moved for partial summary judgment on several issues, including an issue that was described in the court’s order as being “[w]hether [Murray] erred under settled Nebraska law in failing to make a QTIP election on the [estate tax return] with respect to all property passing to the [trust benefiting Elizabeth], including the property purportedly disclaimed pursuant to the two Disclaimers.” The court noted that in making the QTIP election, Murray acted under the assumption that the disclaimers were valid and that therefore, no QTIP election could be made for the disclaimed property because such property was not part of the trust benefiting Elizabeth. The court concluded as a matter of law that the disclaimers were invalid and that as a consequence, the purportedly disclaimed property must be included in the QTIP election. Based on its assessment of the state of the law at the time, the court specifically stated that “it should have been clear that the Disclaimers were invalid and the purportedly disclaimed property must be included in the QTIP election.”

Murray challenges the quoted statement on cross-appeal. Murray contends that the statement can be read as though the district court concluded as a matter of law that Murray's conduct fell below the standard of conduct, thereby effectively determining that Murray was negligent. Murray argues in its brief that in the event this cause is remanded for further proceedings on the O'Daniels' claims, we "should clarify that the question whether . . . Murray reasonably believed the Disclaimers were valid presents a question of fact" to be determined by the jury and that Murray should be permitted to present expert testimony relative thereto. Brief for appellees on cross-appeal at 48.

Taking the August 22, 2011, order as a whole, we do not read the court's order as Murray suggests and we reject Murray's assignment of error to the extent it asserts that the district court preempted the jury's function. In this regard, we note that in the August 22 order, after the court made the challenged statement, the order continued and states "but whether this error constitutes negligence is a question of fact for the jury to decide." We believe this statement shows that the district court properly understood the legal framework of a legal malpractice action. Nevertheless, because we remand the cause for further proceedings on the disclaimer advice and QTIP election claims, we provide clarification of what issues in a professional negligence case are questions of law for the court and what issues are questions of fact for the fact finder.

[19-23] In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client. *Young v. Govier & Milone*, ante p. 224, 835 N.W.2d 684 (2013). With regard to the element of neglect of a reasonable duty, we have set forth the following propositions of law: In a legal malpractice action, the required standard of conduct is that the attorney exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances. *Id.* Although the general standard of an attorney's conduct is established by law, the question of what

an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact. *Id.* Expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith. *Id.* A conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment. *Id.*

The district court in its August 22, 2011, order cited *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 703-04, 578 N.W.2d 446, 451 (1998), for the proposition that "[w]hen an attorney is charged with an error concerning a legal question, the trial court must initially determine whether the attorney erred . . . ." We similarly read *Baker* as holding that to the extent there is an issue as to what the law was and whether the attorney correctly advised on such law is a question of law for the court rather than a question of fact to be submitted to the jury.

However, a critical issue in a legal malpractice case is a question of fact regarding whether the attorney's specific conduct fell below what the attorney's specific conduct should have been in that particular case. While the court might decide that the attorney's advice did not comport with the substance of the law at the time it was given, it is a question of fact whether under the particular circumstance the attorney's conduct was such that the attorney exercised such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances.

We note that subsequent to the decision in *Baker*, this court in *Boyle v. Welsh*, 256 Neb. 118, 124, 589 N.W.2d 118, 124 (1999), explicitly held for the first time that "expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith." Thus, reading *Baker* in light of *Boyle* and other cases regarding questions of fact in legal malpractice cases, we conclude that while it is a question of law for the court as to whether an attorney's advice comports with the law or whether an attorney's advice was erroneous, the question whether such error caused the attorney

to fall below the standard of conduct is a question of fact and expert testimony can be used to establish whether the conduct was in conformity with the standard. See *Young v. Govier & Milone, supra*.

Having reviewed these standards, we note that the ruling of which Murray complains on cross-appeal was made by the district court prior to the jury trial on the QTIP election claim. That trial ended in a mistrial, and the court thereafter resolved the claim by entering a directed verdict in favor of Murray after the court determined that the claim was barred by the statute of limitations and that the O'Daniels failed to show damages. Thus, as the claim was resolved below, the court's ruling that Murray erred with respect to the substance of the legal advice was not relevant to the resolution of the case. We note further that on cross-appeal, Murray does not directly argue that the court erred when it determined as a matter of law that the disclaimers were invalid. Instead, Murray's argument is that the court's order was erroneous to the extent it could be read to state that Murray's actions with regard to the disclaimer and the QTIP election were negligent. Because the court's determination that the disclaimers were not valid was not relevant to the ultimate disposition of the claim below, and because Murray does not specifically assign error to such determination, we make no comment as to whether the court was correct as a matter of law when it concluded that the disclaimers were invalid. Instead, we provide the above review of standards regarding questions of law and questions of fact with regard to breach of the standard of care in order to address Murray's concern that the court's ruling could be used on remand to hold as a matter of law that Murray's advice was negligent, thereby subverting a jury finding with respect to negligence.

### CONCLUSION

With regard to the conflict of interest claim, we find no error in the court's entry of judgment in favor of Murray based on the jury's verdict that the claim was barred by the statute of limitations. We therefore affirm the court's judgment in favor of Murray on the conflict of interest claim. With

regard to the disclaimer advice claim, we conclude that the district court erred when it concluded on summary judgment that the statute of limitations barred the claim based on its determination that the O'Daniels were put on inquiry notice of the claim when they learned the amount of the tax liability in April 2002. We therefore reverse the order granting summary judgment in favor of Murray on the disclaimer advice claim, and we remand the cause for further proceedings on the claim. With regard to the QTIP election claim, we conclude that the district court erred when it concluded that the statute of limitations barred the claim and when it concluded that the O'Daniels failed to put on evidence of damages proximately caused by Murray's alleged negligence. We therefore reverse the order granting a directed verdict in favor of Murray on the QTIP election claim, and we remand the cause for further proceedings on the claim. With regard to Murray's cross-appeal, we find no merit to the cross-appeal and we set forth standards regarding questions of law and questions of fact in a legal malpractice case that should be applied in the proceedings on remand.

AFFIRMED IN PART, AND IN PART REVERSED AND  
REMANDED FOR FURTHER PROCEEDINGS.

MILLER-LERMAN, J., participating on briefs.

WRIGHT, McCORMACK, and CASSEL, JJ., not participating.

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IN RE APPLICATION A-18503, WATER DIVISION 2-D.  
MIDDLE NIOBRARA NATURAL RESOURCES DISTRICT ET AL.,  
APPELLANTS, V. DEPARTMENT OF NATURAL RESOURCES  
AND NEBRASKA PUBLIC POWER DISTRICT, APPELLEES.

838 N.W.2d 242

Filed October 4, 2013. No. S-12-1166.

1. **Administrative Law: Appeal and Error.** In an appeal from a Department of Natural Resources order, an appellate court reviews whether the director's factual determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.
2. \_\_\_\_: \_\_\_\_\_. In an appeal from a Department of Natural Resources order, an appellate court independently reviews questions of law decided by the director.

3. **Jurisdiction: Judgments.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
4. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
5. **Actions: Parties: Standing.** A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.
6. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.
7. **Standing.** Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself.
8. **Standing: Jurisdiction: Claims: Parties.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.
9. **Actions: Standing: Complaints: Justiciable Issues: Proof.** To establish standing, a litigant must first clearly demonstrate that it has suffered an injury in fact. That injury must be concrete in both a qualitative and a temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. Second, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.

Appeal from the Department of Natural Resources. Affirmed.

Donald G. Blankenau, Thomas R. Wilmoth, and Vanessa A. Silke, of Blankenau, Wilmoth & Jarecke, L.L.P., for appellants.

Jon Bruning, Attorney General, Justin D. Lavene, and Blake E. Johnson for appellee Department of Natural Resources.

Stephen D. Mossman and Patricia L. Vannoy, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee Nebraska Public Power District.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

## I. INTRODUCTION

The Nebraska Public Power District (NPPD) filed with the Department of Natural Resources (DNR) an application to appropriate additional surface water from the Niobrara River. As relevant to this appeal, Middle Niobrara Natural Resources District and Lower Niobrara Natural Resources District (collectively NRD's) and Thomas Higgins each filed amended objections to the application. We note that during the pendency of this appeal, a fourth party who also held existing and pending water appropriations is now deceased and thus dismissed from this action. We therefore will refer only to the remaining three appellants. The DNR dismissed all objections *sua sponte*. The NRD's and Higgins appeal those dismissals. We affirm.

## II. BACKGROUND

NPPD filed application A-18503 with the DNR on or about April 16, 2007. The application requested the appropriation of an additional 425 cubic feet per second (cfs) of natural flow from the Niobrara River to add to the 2,035 cfs already appropriated to NPPD in order to fulfill the entire capacity of the hydropower units at NPPD's hydropower facility, Spencer Dam. Notice of NPPD's application was published on March 15, 2012.

The NRD's and Higgins each filed objections to NPPD's application. The NRD's are political subdivisions of the State of Nebraska, charged with managing ground water within the borders of their districts; Higgins is the owner of real property in the Niobrara River Basin and, in relation to NPPD, holds senior existing and pending Niobrara River surface water appropriations.

As noted above, the objections and requests for hearings were dismissed *sua sponte* by the DNR. In the DNR's order of dismissal, the director concluded that the objectors lacked standing. In particular, the NRD's did not

allege any legal right, title, or interest in the subject water of the Niobrara River. In addition, their allegations of harm are based upon mere conjecture that granting

A-18503 with its April 11, 2007, priority will cause a portion of the basin to be declared fully appropriated sometime in the future.

The director concluded that Higgins' pending application did not confer standing because no legal right existed with a pending application. The director further found that even if those applications were granted and perfected, they, along with Higgins' existing appropriations, would be senior and upstream of A-18503. As such, the director did not find Higgins' allegations of harm credible. The director also noted that any allegation of harm by hypothetical taxation by a natural resources district was speculative and not distinguishable from harm caused to any other landowner within the natural resources district. Finally, the director noted the allegation that granting A-18503 was against the public interest was a conclusion of law and not an allegation of fact.

The NRD's and Higgins appealed.

### III. ASSIGNMENTS OF ERROR

The appellants assign as error, restated and renumbered, that the director (1) erred in concluding that the NRD's lacked a legally cognizable interest to confer standing to object, (2) erred in concluding that Higgins would not be adversely affected in a manner sufficient to confer standing to object, (3) applied an improper standard of review, and (4) failed to consider the impact of granting the application on the public interest.

### IV. STANDARD OF REVIEW

[1,2] In an appeal from a DNR order, we review whether the director's factual determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.<sup>1</sup> But we independently review questions of law decided by the director.<sup>2</sup>

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<sup>1</sup> *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

<sup>2</sup> See *id.*

[3,4] A jurisdictional issue that does not involve a factual dispute presents a question of law.<sup>3</sup> Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.<sup>4</sup>

## V. ANALYSIS

### 1. STANDING

[5,6] The primary issue on appeal in this case is whether the DNR was correct in concluding that the appellants lacked standing. A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.<sup>5</sup> A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.<sup>6</sup>

[7,8] Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself.<sup>7</sup> And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.<sup>8</sup> Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.<sup>9</sup>

[9] Specifically, a litigant first must clearly demonstrate that it has suffered an injury in fact.<sup>10</sup> That injury must be concrete

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<sup>3</sup> *Id.*

<sup>4</sup> *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005).

<sup>5</sup> *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *id.*

in both a qualitative and a temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.<sup>11</sup> Second, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.<sup>12</sup>

(a) NRD's

The appellants first assign the DNR erred in finding that the NRD's lacked standing. In its order, the DNR concluded that the NRD's lacked standing because they failed to allege any legal right, title, or interest in the subject water of the Niobrara River and, further, that their allegations were based upon mere conjecture that the granting of the application would cause a portion of the Niobrara River Basin to be declared fully appropriated in the future.

The NRD's cite to the Nebraska Ground Water Management and Protection Act<sup>13</sup> and this court's opinion in *Middle Niobrara NRD v. Department of Nat. Resources*<sup>14</sup> to support the assertion that they have standing because they are responsible for the management of ground water that is hydrologically connected to the Niobrara River and its tributaries. The NRD's contend that "[i]n a very real sense, the Districts manage much of the very same waters NPPD will appropriate by A-18503, but at a different time and location."<sup>15</sup> The NRD's argue that A-18503 is connected to prior and ongoing proceedings concerning the Niobrara River and Spencer Dam and that it is foreseeable that diverting still more water for the Spencer Dam will increase the likelihood that the Niobrara River will be designated as fully appropriated. In further support of this argument, the NRD's direct this court to primarily

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Neb. Rev. Stat. §§ 46-701 to 46-754 (Reissue 2010 & Cum. Supp. 2012).

<sup>14</sup> *Middle Niobrara NRD v. Department of Nat. Resources*, *supra* note 1.

<sup>15</sup> Brief for appellants at 11.

federal case law suggesting that “*threatened* injury can satisfy standing requirements.”<sup>16</sup> They also argue that the granting of the application will “preclude other local interests from obtaining rights to that water and that doing so may limit the future tax base of the NRDs, on which they rely to manage ground water.”<sup>17</sup>

These arguments are without merit. This court did find, in *Middle Niobrara NRD*, that a natural resources district was an “interested party” and had standing to challenge the DNR’s designation of a river basin as fully appropriated. In *Middle Niobrara NRD*, this court noted that ordinarily a natural resources district lacked “water rights adversely affected” by a DNR order and that as such, a natural resources district would lack standing.<sup>18</sup> But we noted that the situation in *Middle Niobrara NRD* was different: “[U]nlike our earlier cases, the [DNR’s] action [in designating the river basin as fully appropriated] triggers duties for the [natural resources districts] that will require them to spend public funds. . . . Neb. Rev. Stat. § 77-3442(4)(c) (Reissue 2009) supports this claim.”<sup>19</sup> We concluded that “because the [natural resources districts] have fiduciary duties with regard to the public funds that they are charged with raising and controlling, they have standing to challenge state action that requires them to spend those funds.”<sup>20</sup>

We disagree with the contention made by the NRD’s that in the case at bar their interests are “substantially the same” as those that conferred standing in *Middle Niobrara NRD*.<sup>21</sup> Standing under *Middle Niobrara NRD* was premised on the duties placed upon a natural resources district by the Nebraska Ground Water Management and Protection Act once a fully

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<sup>16</sup> *Id.* (emphasis in original).

<sup>17</sup> *Id.* at 12.

<sup>18</sup> *Middle Niobrara NRD v. Department of Nat. Resources*, *supra* note 1, 281 Neb. at 646, 799 N.W.2d at 315.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 647, 799 N.W.2d at 315-16.

<sup>21</sup> Brief for appellants at 7.

appropriated designation had been made—duties which do not exist here because no fully appropriated determination has been made. We cannot conclude that a party has standing because an application *might* be granted, which then *might* lead to a fully appropriated designation. To do so would be to find standing based upon speculation; years of Nebraska case law prohibit the conferring of standing under such circumstances.

And the reliance by the NRD's on federal case law holding that a "threatened" injury can be sufficient to establish standing is not persuasive. Nebraska case law is clear that an injury in fact must be "concrete," "actual and imminent," and "requires a more particularized harm to a more direct, identified interest."<sup>22</sup> The speculative claims made by the NRD's cannot confer standing under existing Nebraska case law, and we decline to disregard that authority.

Finally, the NRD's contend that the appropriation will preclude the use of that water for irrigation and limit their tax base. But such claim is speculative: We noted in *Central Neb. Pub. Power Dist.* that "[i]t is axiomatic that any use of a limited resource necessarily results in marginally less availability of that resource for potential use by others. An injury in fact, for standing purposes, requires a more particularized harm to a more direct, identified interest."<sup>23</sup>

The DNR did not err in dismissing the objections by the NRD's for lack of standing. The appellants' first assignment of error is without merit.

#### (b) Higgins

The appellants next assign that the DNR erred in finding that Higgins lacked standing. The DNR found that Higgins claimed to hold current surface water appropriations and was an applicant for further Niobrara River appropriations. But the DNR concluded that Higgins failed to allege sufficient

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<sup>22</sup> *Central Neb. Pub. Power Dist. v. North Platte NRD*, *supra* note 5, 280 Neb. at 544, 788 N.W.2d at 261.

<sup>23</sup> *Id.* at 543-44, 788 N.W.2d at 261.

allegations of harm and thus did not have standing to object to A-18503.

In his objections, Higgins alleged that the granting of the application “may” increase his property taxes, and also that it “may” affect the value of his real property. Higgins further alleged that the granting of the application would affect his existing appropriations and would increase the cost of his pending applications.

We find that Higgins’ allegations that the granting of the application “may” increase his taxes and affect the value of his real property are both speculative, and not “actual or imminent.” As such, both are insufficient to confer standing. Nor are his allegations that the granting of the application will affect his existing appropriations and increase the cost of his pending applications sufficient to confer standing. Those allegations fail to explain how his rights would be affected when all are both upstream and senior to the appropriation requested in A-18503. Moreover, as noted above, we held in *Central Neb. Pub. Power Dist.* that the fact the application might result in less water overall in the Niobrara River for Higgins’ use is not a sufficiently “particularized harm to a more direct, identified interest.”<sup>24</sup>

The DNR did not err in dismissing Higgins’ objections for lack of standing. The appellants’ second assignment of error is without merit.

## 2. STANDARD OF REVIEW

In the appellants’ second assignment of error, they argue that the DNR applied an incorrect standard of review when it dismissed the appellants’ objections for lack of standing because the DNR failed to assume the allegations were true and to view them in a light most favorable to the appellants.

We reject the contention that the appropriate standard was not utilized by the DNR in assessing the appellants’ objections. The appellants lack standing, but not because the DNR failed to assume that the allegations were true and did not view them in a light most favorable to the appellants. Rather, they lack

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<sup>24</sup> *Id.* at 544, 788 N.W.2d at 261.

standing because even when the allegations are assumed as true and viewed in a light most favorable to the appellants, the allegations failed to allege either an interest or an injury sufficient to confer standing. As we concluded above, the allegations of the NRD's failed to establish an interest and the allegations of all the appellants were speculative, not alleged to be actual or imminent, and were not a sufficiently "particularized harm to a more direct, identified interest."<sup>25</sup> This assignment of error is without merit.

### 3. PUBLIC INTEREST

In the appellants' third assignment of error, they argue that Neb. Const. art. XV, § 6, allows the DNR director to deny an application to appropriate water if "'demanded by the public interest,'" and further contend that A-18503 is not in the public interest.<sup>26</sup> The appellants assert that this "bolsters" the standing argument.<sup>27</sup>

But the fact that the granting of an application might not be in the public interest says nothing about whether the appellants have standing in this case. This court has specifically held that natural resources districts cannot assert the public interest.<sup>28</sup> Nor can Higgins. The right and injury asserted in order to establish standing must be the litigant's own: "[I]t is not sufficient that one has merely a general interest common to all members of the public."<sup>29</sup> The appellants' final assignment of error is without merit.

### VI. CONCLUSION

The DNR's dismissal of the appellants' objections for lack of standing is affirmed.

AFFIRMED.

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<sup>25</sup> *Id.*

<sup>26</sup> Brief for appellants at 16.

<sup>27</sup> *Id.*

<sup>28</sup> *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

<sup>29</sup> *Waste Connections of Neb. v. City of Lincoln*, *supra* note 4, 269 Neb. at 862, 697 N.W.2d at 263.

STEPHAN, J., concurring in part, and in part dissenting.

I concur in the majority opinion to the extent that it affirms the dismissal by the Department of Natural Resources (Department) of the two natural resources district (NRD) appellants for lack of standing. But I dissent from the majority's similar disposition with respect to appellant Thomas Higgins. I write separately to state my reasons for both positions.

#### NRD APPELLANTS

Our holding in *Middle Niobrara NRD v. Department of Nat. Resources*<sup>1</sup> recognized an exception to the general rule that an NRD does not have standing to object to an appropriation application when it does not have a water right that would be adversely affected by the application. *Middle Niobrara NRD* was an appeal from the Department's designation, pursuant to the Nebraska Ground Water Management and Protection Act (Act),<sup>2</sup> that a river basin was fully appropriated. We reasoned that because this designation would require an affected NRD to expend public funds pursuant to the Act, the NRD had standing to challenge the designation. We noted that a contrary holding "would leave political subdivisions at the mercy of superior agencies with no redress for actions that improperly or arbitrarily and capriciously require them to spend public funds."<sup>3</sup>

I am not persuaded that we should expand this exception to recognize the standing of an NRD to object to an appropriation which "may result in a fully appropriated determination by [the Department] in the future which will cause increased costs," as the NRD appellants allege in this case. As the majority correctly notes, the alleged injury in fact necessary to confer standing cannot be conjectural or hypothetical and must be capable of redress by a favorable decision in the

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<sup>1</sup> *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011), citing *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

<sup>2</sup> Neb. Rev. Stat. §§ 46-701 to 46-754 (Reissue 2010 & Cum. Supp. 2012).

<sup>3</sup> *Middle Niobrara NRD*, *supra* note 1, 281 Neb. at 647, 799 N.W.2d at 315.

proceeding.<sup>4</sup> Here, the Department's resolution of *this case* will not require the NRD appellants to expend public funds. Even if the Department grants the application of the Nebraska Public Power District (NPPD), such grant is not a determination by the Department that the basin is fully appropriated. Instead, the effect of the resolution of this case on any subsequent determination by the Department as to whether the basin is fully appropriated is completely speculative.

Given the complexity of water regulation in Nebraska, I cannot endorse a legal principle which requires a court to predict whether a particular surface water appropriation would "trigger" a subsequent fully appropriated designation in order to determine whether an NRD has standing to object to the appropriation.<sup>5</sup> No single appropriation causes a river basin to become "fully appropriated." As we noted in *Middle Niobrara NRD*, the Department's determination of whether a basin is fully appropriated focuses on whether the river's surface water is sufficient to sustain all existing appropriations. One could logically argue that *any* appropriation, from the most senior to the most junior, could eventually trigger a fully appropriated determination in the sense that it contributes to the aggregate total of appropriations which could be determined to exceed the water supply. By accepting the NRD appellants' standing argument in this case, we would essentially be saying that an NRD has standing to challenge *any* surface water appropriation, a proposition that we have previously rejected.

Finally, it is my view that it is not the proper role of an appellate court to engage in the calculus of whether a river basin would become fully appropriated under particular factual circumstances in advance of a determination of that issue by the Department. The Act requires the Department to annually evaluate "the expected long-term availability of hydrologically connected water supplies *for both existing and new surface water uses and existing and new ground water*

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<sup>4</sup> See *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

<sup>5</sup> See *Middle Niobrara NRD*, *supra* note 1, 281 Neb. at 645, 799 N.W.2d at 314.

uses in each of the state's river basins" in order to determine if the basin is "fully appropriated."<sup>6</sup> Our role is to hear and decide appeals from such administrative determinations,<sup>7</sup> applying a standard of review which requires us to affirm the Department's factual determinations if they are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.<sup>8</sup> Were we to engage in a standing analysis requiring that we determine whether a particular appropriation would likely "trigger" a subsequent fully appropriated determination, our ability to objectively consider an appeal from any subsequent determination by the Department could be questioned.

For these reasons, I agree with the conclusion of the majority that the Department did not err in concluding that the NRD appellants lacked standing to challenge the NPPD application.

#### HIGGINS

Unlike the NRD appellants, Higgins' claim to standing is based on his own water rights. Specifically, he alleges that he holds four surface water appropriations upstream from NPPD's facility and that he has a pending application for another appropriation. These allegations identify a specific legally protectable interest. The key inquiry with respect to standing is whether Higgins has adequately alleged that granting NPPD's application would cause an injury in fact to that interest.

Some of Higgins' allegations fall short of the mark in this regard. His allegation that the requested NPPD appropriation "is contrary to the public interest" does not allege any particularized injury to his interests as distinguished from that of the public at large. And his allegations that granting the application "may increase his property taxes" and "may adversely impact the value of his real property, and real estate values" throughout the basin are clearly speculative.

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<sup>6</sup> § 46-713(1)(a) and (b) (emphasis supplied).

<sup>7</sup> See Neb. Rev. Stat. § 61-207 (Reissue 2009).

<sup>8</sup> See *Middle Niobrara NRD*, *supra* note 1.

But Higgins also alleges that granting the application “will adversely impact his existing appropriations” and “will preclude or otherwise increase the cost of” his pending application for an additional appropriation. While these allegations provide no explanation as to *how* the appropriation would adversely affect Higgins’ water rights, I regard them as sufficient notice pleading to preclude summary dismissal for lack of standing. As noted in the separate dissent, we held in *Ponderosa Ridge LLC v. Banner County*<sup>9</sup> that landowners having “water use interests to protect” had standing to challenge an agreement which would have transferred ground water from a Nebraska well to Wyoming. Similarly, in *Hagan v. Upper Republican NRD*,<sup>10</sup> we held that irrigators challenging a ground water agreement between an NRD and a hog confinement facility had established standing sufficient to overcome a demurrer by alleging that the agreement would result in depletion of an aquifer to the detriment of their own water use interests. We noted that this holding did not prevent the defendants from challenging the irrigators’ standing at a later date if they were unable to prove their allegations regarding injury in fact.

In dismissing Higgins’ objection on its own motion, the Department acted pursuant to a regulation which authorizes the director to “dismiss a complaint or objection without holding a hearing when it is found there is a lack of jurisdiction or of authority to grant the relief requested.”<sup>11</sup> Because no hearing was held and no evidence received, the Department could assess only the facial adequacy of Higgins’ allegations with respect to standing. But instead, the Department addressed the merits of Higgins’ allegations without giving him an opportunity to be heard on the issue.

In an appeal from a district court’s order sustaining a motion to dismiss a civil action, we conduct a *de novo* review in which we accept all the factual allegations in the complaint as true

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<sup>9</sup> *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 948, 554 N.W.2d 151, 156 (1996).

<sup>10</sup> *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001).

<sup>11</sup> 454 Neb. Admin. Code, ch. 7, § 005 (2012).

and draw all reasonable inferences for the nonmoving party.<sup>12</sup> I would apply the same standard of review here and conclude that Higgins' allegations of injury in fact were sufficient as notice pleading and that the Department erred in dismissing him on its own motion.

McCORMACK, J., joins in this concurrence and dissent.

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<sup>12</sup> *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013); *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013).

CONNOLLY, J., dissenting.

I dissent from the majority opinion's holding that the appellants lack standing to object to the application of the Nebraska Public Power District (NPPD). The majority opinion ignores evidence of imminent harm that will result from an approval of the application. It ignores our own case law recognizing that landowners had standing in similar cases. And it misconstrues our case law to create inappropriate hurdles to standing.

Under Neb. Rev. Stat. § 61-206 (Reissue 2009), the Department of Natural Resources (Department) has jurisdiction to hear and adjudicate all "complaints, petitions, or applications" in any matter pertaining to water rights for irrigation, power, or other beneficial purposes, except where its authority is limited by statute.<sup>1</sup> The three appellants—two natural resources districts (NRDs) and Thomas Higgins, an existing surface water appropriator in the Lower Niobrara River Basin—filed their objections under the Administrative Procedure Act (APA) and title 454, chapter 7, of the Department's regulations. The APA permits parties to petition for a hearing in a "contested case." This means any proceeding in which a state agency is required to determine a party's legal rights, duties, or privileges.<sup>2</sup>

The Department's regulations define adjudicative proceedings to include cases to approve applications or petitions. The regulations also define applications to include an application to

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<sup>1</sup> See *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012).

<sup>2</sup> See Neb. Rev. Stat. §§ 84-901(3) and 84-913 (Reissue 2008).

appropriate water under Neb. Rev. Stat. § 46-233 or § 46-259 (Reissue 2010).<sup>3</sup> The regulations specifically provide that a contested case is commenced by a formal objection to an application or petition.<sup>4</sup> So, the Department does not claim that the appellants did not properly request a contested hearing to have their rights determined.

In addition, the regulations define an “interested person” in a contested case as one “who is *or could be* adversely affected in a legally cognizable way by the outcome of a proceeding.”<sup>5</sup> Yet under the director’s view of standing, no appropriator with a preexisting permit can object to NPPD’s application because even if it is approved, the appropriator would not be subject to a call by NPPD. A “call” is a senior appropriator’s request that the Department shut off the water rights of upstream junior appropriators. Junior appropriators are those with a later-in-time priority date, which is the date on which the application to divert or otherwise appropriate a stream’s water is filed.<sup>6</sup> The Department administers the call (closes the water rights of upstream junior appropriators) to satisfy the downstream senior appropriation.<sup>7</sup>

The director reasoned that NPPD’s calls affect only upstream junior appropriators. That is, a call by NPPD could never shut off an upstream senior appropriator’s superior right to use surface water. So, he concluded that only an upstream junior appropriator with a priority date after April 2007 could have standing to object to NPPD’s application because only such an appropriator could be subject to a call to satisfy NPPD’s latest appropriation.

The director also determined that the NRDs lacked standing to challenge NPPD’s application. We have previously held that affected natural resources districts have standing to challenge a fully appropriated designation for a river basin because

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<sup>3</sup> See 454 Neb. Admin. Code, ch. 7, §§ 001.01C and 001.02B (2012).

<sup>4</sup> See 454 Neb. Admin. Code, ch. 7, § 002.01 (2012).

<sup>5</sup> 454 Neb. Admin. Code, ch. 7, § 001.07 (2012) (emphasis supplied).

<sup>6</sup> See Neb. Rev. Stat. §§ 46-203 to 46-205 and 46-235 (Reissue 2010).

<sup>7</sup> See *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

it triggers duties for the districts that require them to spend public funds and levy taxes to taxpayers in their districts.<sup>8</sup> But the director rejected their claim that the appropriation would trigger a “fully appropriated” designation as too speculative to show that an actual or imminent harm will result from the Department’s approval of NPPD’s application. I believe that the director’s conclusions are incorrect.

NPPD’s application to appropriate an additional 425 cubic feet per second (cfs) of water to produce hydropower is a significant enlargement of its previous appropriations. By way of comparison, in setting the limits for irrigation appropriations, Neb. Rev. Stat. § 46-231 (Reissue 2010) provides that surface water allotments “shall not exceed one cubic foot per second for each seventy acres of land and shall not exceed three acre-feet in the aggregate during one calendar year for each acre of land for which such appropriation had been made.”

Comparing NPPD’s requested appropriation to irrigation allotments puts its size in perspective. There are 7.48 gallons of water in a cubic foot, or 748 gallons in 100 cubic feet.<sup>9</sup> An acre-foot of water is a measure of volume and, under Nebraska’s statutes, equals 43,560 cubic feet<sup>10</sup> or 325,829 gallons of water—enough to cover an acre of land in a foot of water. Conversion tables typically equate a flow rate of 1 cfs per day to a volume of 1.98 acre-feet per day.<sup>11</sup> Using this measure, a stream flowing constantly at 425 cfs carries a volume of water equivalent to 841.5 acre-feet per day. This is the maximum annual irrigation allotment (3 acre-feet) for 280.5 acres in a single day. In a year, a flow rate of 425 cfs is equivalent to 307,147.5 acre-feet of water, which is the same as the maximum annual irrigation allotment for about 160 square miles.

It doesn’t require a math wiz to know that NPPD’s requested appropriation is a lot of water. And, if granted, the appropriation

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<sup>8</sup> See *id.*

<sup>9</sup> See Richard S. Harnsberger & Norman W. Thorson, *Nebraska Water Law & Administration* § 1.02 (Butterworth Legal Publishers 1984).

<sup>10</sup> See Neb. Rev. Stat. § 46-228 (Reissue 2010).

<sup>11</sup> See Harnsberger & Thorson, *supra* note 9.

will have a significant adverse effect on the availability of water for future upstream appropriations. It is true that an appropriation to produce hydropower does not remove water from the river. But like instream appropriations, NPPD's appropriation, if approved, is an allotment that must be satisfied before junior appropriators can divert water from the stream.<sup>12</sup>

Yet despite the huge volume of water that NPPD requested, and despite a statutory mandate requiring the Department to promptly act on an appropriation application for the development of water power,<sup>13</sup> the Department sat on NPPD's application for 5 years before publishing notice of it. Notwithstanding its failure to act, the pleadings sufficiently show that the appropriation presents an imminent harm to the appellants because it is highly likely to result in a fully appropriated determination for the entire river basin.

We have set out the contours of standing many times:

To have standing, a litigant must assert its own rights and interests and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense. The alleged injury in fact must be distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. A party must have some legal or equitable right, title, or interest in the subject of the controversy. Finally, standing requires that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.<sup>14</sup>

Here, both Higgins and the NRDs have alleged sufficient facts to show that they would be adversely affected by the Department's approval of NPPD's application. Higgins alleged that his February 2007 application for an appropriation is still pending. But if the Department determines that the Lower Niobrara River Basin is fully appropriated, it must place an

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<sup>12</sup> See *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

<sup>13</sup> See Neb. Rev. Stat. § 46-234 (Reissue 2010).

<sup>14</sup> *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 907, 814 N.W.2d 724, 728 (2012) (citations omitted).

immediate stay on any new appropriations, including Higgins' request.<sup>15</sup> In addition, Higgins alleged that the designation will increase his property taxes to fund water management by the local natural resources districts. As mentioned, we have held that affected natural resources districts have standing to challenge a fully appropriated determination for that reason.<sup>16</sup> And under the Department's current regulations, a fully appropriated determination is not a remote possibility.

The Department concedes that it has not amended its regulations since 2011 when we decided *Middle Niobrara NRD v. Department of Nat. Resources*.<sup>17</sup> And those regulations require it to determine that a river basin is fully appropriated if the most junior appropriator could not divert enough surface water to meet the Department's minimum irrigation requirements for 70 acres of corn during the growing season.<sup>18</sup> This is the Department's method of determining whether there is a dependable water supply for another appropriator.

In addressing the question of who, if not the appellants, would have standing, the Department claimed at oral arguments that an appropriator with a later priority date than NPPD's application date existed. Because that appropriator would be subject to a call to satisfy NPPD's newest appropriation, it would have standing to object. Leaving aside whether the existence of an upstream junior appropriator is plausible, NPPD's application shows that if its appropriation is approved, it is highly unlikely that this most junior appropriator could obtain enough water to dependably irrigate 70 acres of corn. If not, the river basin would be fully appropriated. And this result is illustrated by NPPD's own flow rates at Spencer Dam.

In NPPD's application to use the river's natural flow for power, it provided a chart with the daily mean (average) flow rates through its hydropower units at Spencer Dam for the

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<sup>15</sup> See Neb. Rev. Stat. § 46-714(1) (Reissue 2010).

<sup>16</sup> See *Middle Niobrara NRD*, *supra* note 7.

<sup>17</sup> *Id.*

<sup>18</sup> See *id.*, citing 457 Neb. Admin. Code, ch. 24, § 001-01A (2006).

years 2004 through 2006. As the majority opinion states, NPPD already has existing appropriations for surface water that equal 2,035 cfs. If the Department grants NPPD's application for an additional 425 cfs, it will have total appropriations of 2,460 cfs. But NPPD's flowchart shows that for the 3 documented years, 2,460 cfs was the highest average daily flow rate that ever ran through its hydropower units and that Spencer Dam rarely received that flow rate.

Specifically, in 2004, there were no days that Spencer Dam received an average flow rate of 2,460 cfs. In 2005, there were only 4 days that the dam received an average flow rate of 2,460 cfs. In 2006, there were only 2 days that the dam received an average flow rate of 2,460 cfs. In total, Spencer Dam received an average daily flow rate of 2,460 cfs for only 6 days out of 3 years. So if NPPD's appropriations had totaled 2,460 cfs during the years 2004 through 2006, the river's streamflow likely would have been insufficient to conclude that enough water was available for an upstream, junior appropriator to meet the Department's irrigation standards.

It is true that the Department may not determine that the surface water of a river is fully appropriated by comparing a senior appropriation right to the streamflow values at a specific diversion point or streamflow gauge.<sup>19</sup> Its current regulations specifically require it to use streamflow data and diversion records to project whether the most junior appropriator could divert sufficient water to meet its irrigation standards.<sup>20</sup> But under § 46-235, the Department must minimally determine that there is unappropriated water in a stream before approving a new application to appropriate water. And if the last-in-time appropriation would rarely have been satisfied, the river's streamflow likely would not have been a dependable water source for any subsequent appropriation from 2004 through 2006.

Moreover, in 2007, the Department closed the diversion rights of about 400 upstream junior appropriators to satisfy

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<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

NPPD's existing appropriations of 2,035 cfs.<sup>21</sup> The Department later determined that the river basin was fully appropriated because the river's surface water was insufficient to sustain existing appropriations.<sup>22</sup> We reversed and vacated that determination based on the Department's arbitrary application of its regulations for determining that there was insufficient water. We did not, however, decide whether the river basin was fully appropriated, and the Department has never revised its conclusion regarding the basin's 2008 status. Nor do we have its determinations for the years since 2008.

But Spencer Dam sits downstream near the eastern end of the Niobrara River.<sup>23</sup> So the scarcity of days in which Spencer Dam actually received an average flow rate of 2,460 cfs between January 2004 and December 2006, and the Department's 2007 actions support the appellants' allegations of imminent harm. In short, if Spencer Dam rarely receives 2,460 cfs, then the Department's approval of NPPD's increased appropriation to a total of 2,460 cfs will drastically increase the chances that in any given year, the Department will declare the river's surface water to be fully appropriated. Under its current regulations, that finding will trigger a fully appropriated designation for the entire river basin.

Moreover, even if the Department did not declare that the river basin was fully appropriated, a farmer or rancher with an existing appropriation obviously has an interest in whether he can ever seek an additional appropriation. And the Department's approval of NPPD's application will greatly decrease the availability of water for future appropriations.

This court has never held that a landowner with an existing appropriation must show a definite injury to have standing to challenge new appropriations from the same water source. Our holdings on standing in water cases have generally been confined to concluding that a political subdivision lacks standing

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<sup>21</sup> See *id.*, citing *In re 2007 Appropriations of Niobrara River Waters*, *supra* note 1.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

to challenge an application when it is representing the interests of third parties, instead of its own interests.<sup>24</sup>

In contrast, we have explicitly recognized that landowners with an existing appropriation can object to a later application to appropriate water from the same water source. For example, in *Ponderosa Ridge LLC v. Banner County*,<sup>25</sup> a county, a natural resources district, and three individuals filed objections to a corporation's application to transfer 1,532 acre-feet of water per year from its well in Nebraska to its pig production facilities in Wyoming. Only two of the individuals had existing water rights. The Department denied the corporation's application. On appeal, we held that only the individuals with existing water rights had standing to object. We did not, however, require them to show that the transfer of water to Wyoming would actually deplete the water that was available to them.

Similarly, in *Hagan v. Upper Republican NRD*,<sup>26</sup> we held that landowners had standing in a declaratory judgment action to challenge a natural resources district's allegedly illegal agreement to grant additional ground water to other landowners after the district had denied the plaintiffs' request for a variance. The plaintiffs alleged that the defendants drew water from the same aquifer that was underlying the plaintiffs' land.

Specifically, they alleged that "there is less water available for them for future requests in that the now declining water table of the aquifer will decline further by virtue of the withdrawal of the water by the Defendants."<sup>27</sup> Relying on our decisions in *Ponderosa Ridge LLC* and *Ainsworth Irr. Dist. v. Bejot*,<sup>28</sup> we held that the plaintiffs' allegation that

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<sup>24</sup> See, e.g., *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010); *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

<sup>25</sup> *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

<sup>26</sup> *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001).

<sup>27</sup> *Id.* at 315, 622 N.W.2d at 629.

<sup>28</sup> *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 416 (1960).

the natural resources district's agreement would deplete the source of water in which they held an interest was sufficient to confer standing to object to the agreement. Their alleged harm was obviously a threatened future injury—not a present actual injury.

The appellants cite all of these cases, and they are directly on point. Yet the majority opinion fails to address them. Instead, the opinion relies on a statement from *Central Neb. Pub. Power Dist v. North Platte NRD*.<sup>29</sup> But that reliance is incorrect here.

In that case, a public power and irrigation district (Central) operated a large reservoir that was used for several purposes, including to distribute water for irrigation and to generate hydropower. Central objected to a natural resources district's proposed regulations to reduce ground water pumping in the basin of one of its tributaries. Central argued that the reduction was inadequate to restore the tributary's historic streamflow. It sought a court order reversing the natural resources district's decision and directing it to impose greater restrictions. The court concluded that Central was not in the district's territory and that, as a surface water appropriator, it was not affected by ground water appropriations in the district.

On appeal, we discussed *Ponderosa Ridge LLC, Hagan*, and two other cases to illustrate when a party has or has not alleged a sufficient interest to confer standing. We contrasted our holdings that political subdivisions lacked standing when they do not assert their own interests with our holdings that landowners with water interests to protect do have standing to object. Regarding Central's broad claim that ground water pumping in the tributary's basin was destroying the reservoir, we concluded that the allegation of an injury was too attenuated and that its theory of causation could not be limited to any direct tributary. We also noted that it was unclear that an order requiring a further reduction of ground water pumping would increase the water available for Central's reservoir because it would first be available to the tributary's surface water appropriators.

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<sup>29</sup> *Central Neb. Pub. Power Dist.*, *supra* note 24.

Our primary holding, however, was that Central lacked standing because it was not asserting its own interests. Instead, we concluded that it was asserting the interests of the public or its constituents for whom it held appropriations and managed water resources. In dicta, we stated that even on behalf of its constituents, Central had not alleged an injury with sufficient particularity:

For example, even if we infer that less water is available to the U.S. Fish and Wildlife Service for endangered species, Central did not allege that the reduced amount of water fell short of what was required or even desirable for that purpose. Nor did Central allege that reduced water delivery to canal operators impaired the operation of their canals. Similarly, although Central alleges that it has its own interest in generating power . . . , it did not allege that it was less able to generate power as a result of the NRD's conduct, nor did it allege that less power was available to its customers. *It is axiomatic that any use of a limited resource necessarily results in marginally less availability of that resource for potential use by others. An injury in fact, for standing purposes, requires a more particularized harm to a more direct, identified interest.*<sup>30</sup>

The majority opinion's reliance on this italicized language is misplaced. Whether Central had sufficiently alleged an injury to its constituents was not a necessary conclusion to our holding that it lacked standing because it was not asserting an injury to its own interests. As we know, a case is not authority for any point made that was not necessary to decide the case.<sup>31</sup>

But even if it were not dicta, the statement should not be interpreted to require a showing of actual harm from a later appropriation. We specifically discussed *Ponderosa Ridge LLC* and *Hagan* as examples of when a party has alleged a sufficient interest to confer standing. Because we did not

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<sup>30</sup> *Id.* at 543-44, 788 N.W.2d at 261 (emphasis supplied).

<sup>31</sup> See *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007).

disturb those holdings, the majority opinion incorrectly relies on a single statement that is inconsistent with the rest of the opinion. Instead, we should recognize that our concern was Central's failure to allege a connection between ground water pumping in another area to its own injury. Those waters may or may not have been hydrologically connected, but the appropriations were certainly not from the same water source, as in the previous cases that we cited with approval. So this statement can only be applied to an objector with an existing appropriation from the same water source by taking it out of context.

Moreover, the probable future injury that existed in *Ponderosa Ridge LLC* and *Hagan* is also sufficient to confer standing under the standing rules that we have adopted from federal courts.

Federal courts have repeatedly held that an actual or threatened injury is sufficient to confer standing.<sup>32</sup> And we have repeatedly held that the alleged injury must be actual or imminent.<sup>33</sup> Imminent means “ready to take place: near at hand: impending: . . . hanging threateningly over one’s head: menacingly near.”<sup>34</sup> It does not mean absolutely certain to occur, nor do federal courts apply it in this manner.<sup>35</sup> These cases show that the requirements of a “threatened” or

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<sup>32</sup> See, e.g., *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986); *Valley Forge College v. Americans United*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979); *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644 (9th Cir. 2011); *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009); *Sutcliffe v. Epping School Dist.*, 584 F.3d 314 (1st Cir. 2009); *Cooper v. U.S. Postal Service*, 577 F.3d 479 (2d Cir. 2009); *Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494 (5th Cir. 2007).

<sup>33</sup> See, e.g., *Butler Cty. Sch. Dist.*, *supra* note 14; *Middle Niobrara NRD*, *supra* note 7; *Central Platte NRD*, *supra* note 12.

<sup>34</sup> Webster’s Third New International Dictionary of the English Language, Unabridged 1130 (1993).

<sup>35</sup> See, generally, 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.4 (2008).

“imminent” injury are related concepts. And standing and its injury-in-fact requirements are jurisdictional rules that we have adopted from federal courts to define those cases that are appropriately resolved through the judicial process.<sup>36</sup> Long before we adopted the U.S. Supreme Court’s injury-in-fact rule in 1993,<sup>37</sup> we had explicitly referred to an actual or threatened injury to explain standing requirements: “‘The questions are, does he have a private individual right involved in controversy, is there a justiciable issue involving the right presented to the court, *and is or will that right be threatened or violated?*’”<sup>38</sup>

Obviously, the Legislature did not intend for the Department’s actions to go unchallenged, and § 61-206 clearly contemplates some interested party’s having an opportunity to be heard. To require a party in a water case to allege an actual injury, as distinguished from the party’s own interest in the same water source that will probably be injured, is an impossible burden: “[W]ater use on most streams is like the federal budget. No one really knows how much water is actually being put to beneficial use by how many people.”<sup>39</sup> And the Department’s own regulations reflect this reality by recognizing that an “interested person” is someone “who is or could be adversely affected . . . by the outcome of a proceeding.”<sup>40</sup>

The Department’s definition of “interested person” distinguishes this case from those in which we have interpreted this term in a statute to mean a person with common-law standing.<sup>41</sup> The statutes in those cases did not define the term, and

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<sup>36</sup> See, *Central Neb. Pub. Power Dist.*, *supra* note 24; *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993); *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989).

<sup>37</sup> See *Baltimore*, *supra* note 36.

<sup>38</sup> See *Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection*, 162 Neb. 781, 784, 77 N.W.2d 464, 465 (1956) (emphasis supplied), quoting *Schroder v. City of Lincoln*, 155 Neb. 599, 52 N.W.2d 808 (1952).

<sup>39</sup> A. Dan Tarlock, *Law of Water Rights and Resources* § 5:15 at 248 (2013).

<sup>40</sup> 454 Neb. Admin. Code, ch. 7, § 001.07.

<sup>41</sup> See, *Middle Niobrara NRD*, *supra* note 7; *Metropolitan Utilities Dist.*, *supra* note 24.

the question whether the regulations defined the term was not raised. But an agency's regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.<sup>42</sup> So even if a probable, future injury were not an imminent injury, the majority opinion fails to acknowledge that the Department's regulations would confer broader standing than common-law standing. And those regulations are consistent with our previous case law on the subject.

Given the legislative intent that someone have standing to object and the Department's own regulations, I believe that our injury-in-fact requirement for standing should be interpreted to the fullest extent in water cases. I do not believe that recognizing standing here would mean that the appellants could object to every application for an appropriation. In most circumstances, the Department is not even required to give notice of an application. More important, the appellants have standing here only because NPPD's own application illustrates the high probability that this appropriation would render the river fully appropriated. A court's impartiality is never called into question by its observance of objective facts that confer standing. It seems to me that ignoring those facts poses a bigger problem.

Moreover, to apply our standing rules more strictly than federal courts to avoid a challenge here is particularly worrisome because the appellants can never challenge the appropriation once the Department approves it. The majority knows that neither the appellants nor anyone else can challenge this appropriation request once it is approved. We have held that such challenges are impermissible collateral attacks.<sup>43</sup> So NPPD's appropriation will continue until abandoned or forfeited. And each year it will significantly increase the risk that the river is fully appropriated.

That designation will impose duties on the affected NRDs that will obviously affect their resident taxpayers. It will also

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<sup>42</sup> *Middle Niobrara NRD*, *supra* note 7.

<sup>43</sup> See, e.g., *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

greatly increase the odds that even if upstream farmers or ranchers can obtain another appropriation in the future, they will pay NPPD for their use of the water. And because of our collateral attack rule, the appellants' standing to challenge a fully appropriated designation will be meaningless.

One more point, and I am done. We have recognized that the stage of the litigation is an important factor in deciding standing. In *Hagan*, for example, the fact that the litigants were still at the pleading stage was specifically tied to our conclusion that the landowners had standing:

Whether the plaintiffs will be able to present evidence to substantiate these allegations, either at trial or on hearing for summary judgment, is a matter that was not before the district court and is not before us. In other words, the defendants are not precluded from preserving and/or asserting a standing challenge at a later time if the plaintiffs are unable to prove that the defendants' use of the underground water would so deplete the aquifer as to injure the plaintiffs' water use interests. The plaintiffs, however, have adequately pled that the depletion of the aquifer will injure their water use interests, and in reviewing a demurrer, we are required to accept this fact as true and not to consider the evidence that might be adduced at trial.<sup>44</sup>

In another water case, we have recognized that at the pleading stage, a determination of standing depends upon whether a plaintiff has alleged an injury in fact and whether discovery is likely to reveal evidence of that injury.<sup>45</sup> And we have stated that "[a]t the pleading stage, the standard for determining the sufficiency of a complaint or petition to allege standing is fairly liberal."<sup>46</sup>

The appellants correctly contend that our decisions are consistent with U.S. Supreme Court precedent: "At the pleading stage, general factual allegations of injury resulting from the

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<sup>44</sup> *Hagan*, *supra* note 26, 261 Neb. at 318-19, 622 N.W.2d at 631-32.

<sup>45</sup> See *Central Neb. Pub. Power Dist.*, *supra* note 24.

<sup>46</sup> *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 853, 814 N.W.2d 102, 107 (2012).

defendant's conduct may suffice, for on a motion to dismiss we 'presume[e] that general allegations embrace those specific facts that are necessary to support the claim.'"<sup>47</sup> The Court has further stated that in determining whether a party has standing, a court should consider the legislative intent in the statutory scheme.<sup>48</sup>

The stage of the proceeding is particularly relevant here because the Department is purported to be considering amendments to its regulations. So the appellants have no way of accurately predicting how NPPD's new appropriation could affect the river basin's status if the Department grants it. But they know what is likely to occur under the Department's existing regulations.

Obviously, discovery could reveal that the appellants' challenge is without merit or that the alleged threat of harm is remote. For instance, discovery might show that the river's average flow rates are much greater than indicated by NPPD's flowchart at Spencer Dam, or that the Department has amended its regulations in a way that makes a fully appropriated determination unlikely even if the Department approves NPPD's application.

But contrary to the reasoning of the majority opinion, bulletproof certainty is not required at the pleading stage of litigation. And if a Nebraska farmer or rancher with an existing interest in the availability of water in a stream doesn't have standing to object to a large appropriation from that stream, who does?

As the separate dissent and concurrence illustrates, the majority's abandonment of our standing rules and twisting of our case law flow from the majority's fear that recognizing standing here will open the litigation floodgates in water disputes. That fear is unfounded. I am not contending that the appellants should or will prevail. Nor am I contending that every Nebraskan should have standing to object to an

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<sup>47</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

<sup>48</sup> See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982).

appropriation application. But standing is determined as it exists when the litigation is commenced.<sup>49</sup> So to hold that existing appropriators do not have standing to object to an appropriation application effectively ensures that no one has standing to object because no appropriator junior to the application will normally exist.

Because the Department's actions affect so many lives and livelihoods, I believe this result is a mistake. The majority's holding will allow the Department to act with impunity because its grant of new appropriations will be immune from adversarial challenge and judicial review. The majority's opinion puts the appellants in a legal straitjacket. And this result is not required by, nor consistent with, our previous decisions on standing in water cases or the Department's own regulations.

In sum, the information submitted with NPPD's own application is sufficient to show at the pleading stage that the alleged injury is imminent, not remote or speculative. But to affirm the director's order, the majority opinion has ignored NPPD's flowchart; ignored the Department's own actions and regulations; distorted our standing standards in a manner that will preclude standing in many future cases; and ignored our case law upholding standing for landowners in similar cases. Its conclusion that the appellants' alleged injury is too speculative rests almost entirely upon a single misconstrued statement made in dicta.

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<sup>49</sup> See *id.*

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IN RE PETITION OF ANONYMOUS 5, A MINOR.

838 N.W.2d 226

Filed October 4, 2013. No. S-13-510009.

1. **Abortion: Minors: Physicians and Surgeons.** Generally, an abortion cannot be performed upon an unemancipated pregnant woman under 18 years of age unless a physician obtains the notarized written consent of both the pregnant woman and one of her parents or a legal guardian.

2. **Statutes: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
3. **Abortion: Minors: Judgments: Appeal and Error.** Under Neb. Rev. Stat. § 71-6904(6) (Cum. Supp. 2012), the Nebraska Supreme Court hears an appeal from a final order denying authorization for an abortion without the consent of a parent or guardian de novo on the record. Accordingly, the court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
4. \_\_\_\_: \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Although the Nebraska Supreme Court's review of a final order denying authorization for an abortion without the consent of a parent or guardian is de novo on the record, the court may consider and give weight to the fact that the judge below heard and observed the witnesses.
5. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
6. **Parental Rights: Parent and Child.** An order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other.
7. **Statutes: Appeal and Error.** When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.
8. **Abortion: Minors: Statutes: Intent.** The obvious intent of Neb. Rev. Stat. § 71-6903(3) (Cum. Supp. 2012) is to avoid requiring a pregnant woman to obtain the consent of a parent or guardian who has abused or neglected her, acts which evidence an obvious disregard of her best interests or well-being.
9. **Abortion: Minors: Pleadings: Proof.** Under the "evidence of abuse . . . or child abuse or neglect" provision of Neb. Rev. Stat. § 71-6903(3) (Cum. Supp. 2012), the pregnant woman must establish that a parent or guardian, who occupies that role in relation to her at the time she files her petition for waiver of parental consent, has either abused her as defined in Neb. Rev. Stat. § 28-351 (Cum. Supp. 2012) or subjected her to child abuse or neglect as defined in Neb. Rev. Stat. § 28-710 (Reissue 2008).
10. **Abortion: Minors: Proof.** In a proceeding brought under the provisions of Neb. Rev. Stat. § 71-6901 et seq. (Cum. Supp. 2012), the burden of proof on all issues rests with the petitioner, and such burden must be established by clear and convincing evidence.
11. **Minors: Emancipation.** Experience, perspective, and judgment are often lacking in unemancipated minors who are wholly dependent and have never lived away from home or had any significant employment experience.
12. **Pleadings.** The issues in a case are framed by the pleadings.
13. **Abortion: Minors: Pleadings.** A petition for waiver of parental consent—which seeks authorization from the court to have an abortion without notarized written consent of a parent or guardian of the petitioner—is limited in scope. The scope of this special statutory proceeding is defined by Neb. Rev. Stat. §§ 71-6901, 71-6903, and 71-6904 (Cum. Supp. 2012).
14. **Abortion: Legislature.** Neb. Rev. Stat. § 71-6903 (Cum. Supp. 2012) is a creation of the Legislature and did not exist at common law.

15. **Abortion: Courts: Jurisdiction.** The district court's jurisdiction over proceedings pursuant to Neb. Rev. Stat. § 71-6901 et seq. (Cum. Supp. 2012) arises from a legislative grant and is inherently limited by the grant.
16. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Because of the limited scope of an action pursuant to Neb. Rev. Stat. § 71-6901 et seq. (Cum. Supp. 2012), in hearing such a matter, the district court acts as a special statutory tribunal to summarily decide the issues authorized by the statute.
17. **Constitutional Law: Statutes: Legislature: Courts.** When the Legislature has expressly chosen a judicial forum for the resolution of issues under Neb. Rev. Stat. § 71-6903 (Cum. Supp. 2012), it is not the Nebraska Supreme Court's province to rewrite the statute or suggest alternate or additional procedures to be utilized in this context, unless the judicial bypass statute violates the state or federal Constitution or a federal treaty.
18. **Legislature: Declaratory Judgments.** The Legislature has authorized a declaratory judgment action.
19. **Constitutional Law: Jurisdiction: Equity.** The equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled.
20. **Administrative Law: Minors: Guardians and Conservators.** The Nebraska Department of Health and Human Services is the legal guardian of all children committed to it.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Catherine Mahern for petitioner.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

## INTRODUCTION

[1] Generally, an abortion cannot be performed upon an unemancipated pregnant woman under 18 years of age unless a physician obtains the notarized written consent of both the pregnant woman and one of her parents or a legal guardian.<sup>1</sup> This proceeding was instituted under the provisions of Neb. Rev. Stat. § 71-6901 et seq. (Cum. Supp. 2012) by a pregnant 16-year-old (petitioner) seeking authorization for an abortion without consent of a parent or guardian. The district court denied her request, and pursuant to the expedited procedures

<sup>1</sup> Neb. Rev. Stat. § 71-6902 (Cum. Supp. 2012).

outlined in § 71-6904, she appeals to this court. Because we determine that petitioner did not establish by clear and convincing evidence that she is a victim of abuse or neglect under § 71-6903(3) or that she is sufficiently mature and well informed to decide on her own whether to have an abortion, we affirm the judgment of the district court.

### BACKGROUND

Petitioner is 16 years old and 10 weeks along in her pregnancy. Due to abuse and neglect by petitioner's biological parents, a juvenile court entered an order in February 2011, placing her temporary custody with the Nebraska Department of Health and Human Services (Department). A juvenile case was initiated, and petitioner and her two siblings, ages 9 and 7, were placed in a foster home through the Department. In May 2013, the juvenile court entered an order terminating by relinquishment the parental rights of petitioner's biological parents.

At the confidential hearing, petitioner explained her desire for an abortion. She testified that she would not be able to financially support a child or "be the right mom that [she] would like to be right now." She feared that she might lose her foster placement if her foster parents learned of her pregnancy. Petitioner testified that her foster parents have strong religious beliefs about abortion. She felt that her foster parents "would not okay" an abortion and that "they would not just be taking it out on [petitioner], it would also be taken out on the child." Petitioner believed that putting the child up for adoption would be worse for her and her family because her foster parents would have resentment toward her. Petitioner feared that her foster parents would tell her siblings that she was a "bad person." The court stated that "when you have the abortion it's going to kill the child inside you," and petitioner responded that she understood. Petitioner answered, "Yes," when the court asked if she would "rather do that than to risk problems with the foster care people?"

The district court determined that because the parental rights of petitioner's biological parents had been terminated, her guardians for the purpose of consent to have an abortion would

be her foster parents. The court found that petitioner was not sufficiently mature to decide whether to have an abortion. The court noted that petitioner is 16 years old, is not self-sufficient, and is dependent upon her foster parents. The court found that it is not in the best interests of petitioner to have an abortion without the consent of one of her foster parents. The court reasoned that “[j]ust because her foster parents have strongly held religious beliefs, does not mean that they will not act in the Petitioner’s best interest.” Therefore, the court denied petitioner’s request for an abortion without the consent of one of her foster parents.

### ASSIGNMENTS OF ERROR

Petitioner assigns, reordered, that the district court erred in (1) failing to recuse itself from the case for lack of impartiality, (2) failing to authorize waiver of parental consent where there was clear and convincing evidence that there was abuse as defined in Neb. Rev. Stat. § 28-351 (Cum. Supp. 2012) or child abuse or neglect as defined in Neb. Rev. Stat. § 28-710 (Reissue 2008), (3) finding that there was not clear and convincing evidence that petitioner was both sufficiently mature and well informed to decide whether to have an abortion, (4) failing to find that petitioner was entitled to consent to her own abortion procedure because she is a ward of the State, and (5) finding that petitioner’s foster parents were her guardians for the purpose of seeking consent to an abortion.

### STANDARD OF REVIEW

[2] The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.<sup>2</sup>

[3,4] Under § 71-6904(6), we hear the appeal de novo on the record. Accordingly, we reappraise the evidence as presented by the record and reach our own independent conclusions with respect to the matters at issue.<sup>3</sup> Although our review is de novo on the record, we may consider and give

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<sup>2</sup> *Pinnacle Enters. v. City of Papillion*, ante p. 322, 836 N.W.2d 588 (2013).

<sup>3</sup> *In re Petition of Anonymous 3*, 279 Neb. 912, 782 N.W.2d 591 (2010).

weight to the fact that the judge below heard and observed the witnesses.<sup>4</sup>

### ANALYSIS

Before reaching the errors assigned by petitioner, we digress to note that the Legislature recently made significant changes to § 71-6901 et seq.<sup>5</sup> This case presents the first opportunity to consider the waiver of consent of a parent or guardian<sup>6</sup> and the provision regarding abuse or neglect of the pregnant woman.<sup>7</sup>

### RECUSAL

[5] Petitioner contends that the judge's questioning of her at the end of the proceeding demonstrated a lack of impartiality such that the judge should have recused himself. However, petitioner did not raise this issue before the district court. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.<sup>8</sup> Accordingly, we do not consider this assignment of error.

### VICTIM OF ABUSE OR NEGLECT

Under the pertinent portions of § 71-6903(3), a court must authorize an abortion without the consent of a parent or a guardian

[i]f the court finds, by clear and convincing evidence, that there is evidence of abuse as defined in [§] 28-351 . . . or child abuse or neglect as defined in [§] 28-710 of the pregnant woman by a parent or a guardian or that an abortion without the consent of a parent or a guardian is in the best interest of the pregnant woman . . . .

Petitioner does not argue on appeal that an abortion without the consent of a parent or a guardian is in her best interests.

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<sup>4</sup> See *In re Petition of Anonymous 2*, 253 Neb. 485, 570 N.W.2d 836 (1997).

<sup>5</sup> See 2011 Neb. Laws, L.B. 690, §§ 3 through 15.

<sup>6</sup> See § 71-6903(2) and (3).

<sup>7</sup> See § 71-6903(3).

<sup>8</sup> *Weber v. Gas 'N Shop*, 278 Neb. 49, 767 N.W.2d 746 (2009).

Thus, we limit our consideration to whether petitioner established evidence of abuse or neglect within the meaning of the statute.

The evidence in the record establishes abuse and neglect by petitioner's biological parents, but that does not end our inquiry under the circumstances of this case. Petitioner's biological father fractured her collarbone and shoulder blade in 2011 and was ultimately convicted of third degree assault. Thus, it is clear that petitioner suffered abuse under § 28-351 by her biological father. The record also establishes that petitioner's biological mother had a drug problem and that she did not contest the allegations of neglect contained in the juvenile petition. There is clear and convincing evidence that petitioner was a victim of neglect under § 28-710 by her biological mother.

[6] But the biological parents no longer have any legal rights or responsibilities relating to petitioner. A court entered an order terminating the parental rights of petitioner's biological parents in May 2013. There was no appeal from the termination order, and it is a final judgment. "An order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other . . . ." <sup>9</sup> Because the parent-child relationship has been judicially severed in this case, no consent is required from either of petitioner's biological parents. And there is no evidence of abuse or neglect by anyone other than her biological parents.

Petitioner argues that the district court erred in finding that the abuse by her biological father in 2011 was not related to her pregnancy or her ability to seek the consent of her foster parents. She cites *Ebert v. Nebraska Dept. of Corr. Servs.* <sup>10</sup> and argues that a court cannot read a meaning into a statute that is not warranted by the language. Petitioner is technically correct that "[n]othing in the statute makes reference to when the abuse, or child abuse or neglect must have taken place,

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<sup>9</sup> Neb. Rev. Stat. § 43-293 (Reissue 2008).

<sup>10</sup> *Ebert v. Nebraska Dept. of Corr. Servs.*, 11 Neb. App. 553, 656 N.W.2d 634 (2003).

nor does the statute state that the abuse must be related to a woman's pregnancy."<sup>11</sup>

[7] But petitioner's interpretation of the statutory language would lead to an absurd result. For example, imagine a child who was abused by her father as a newborn, whose mother divorced the father and raised the child in a safe and loving home, and who 16 years later becomes pregnant and desires an abortion without her mother's consent. Under petitioner's interpretation, the court would automatically have to issue an order authorizing the abortion without the consent of the pregnant woman's mother based solely on abuse by a different parent a decade and a half earlier. Such a result is illogical and could not have been intended by the Legislature. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.<sup>12</sup> Here, petitioner's interpretation would lead to the equally absurd result that because she was abused and neglected by persons from whom no consent is necessary, no consent from anyone is required. Thus, we reject petitioner's interpretation.

[8,9] But an alternative interpretation exists—one that clearly preserves the intent of the Legislature. The obvious intent of § 71-6903(3) is to avoid requiring a pregnant woman to obtain the consent of a parent or guardian who has abused or neglected her, acts which evidence an obvious disregard of her best interests or well-being. Here, petitioner was abused and neglected by her biological parents, and as stated above, she need not obtain consent from them because their parental rights have been terminated. We hold that under the "evidence of abuse . . . or child abuse or neglect" provision of § 71-6903(3), the pregnant woman must establish that a parent or guardian, who occupies that role in relation to her at the time she files her petition for waiver of parental consent, has either abused her as defined in § 28-351 or subjected her to child abuse or neglect as defined in § 28-710. Petitioner has failed to meet this burden.

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<sup>11</sup> Brief for petitioner at 11.

<sup>12</sup> *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 830 N.W.2d 63 (2013).

This does not mean that abuse or neglect by a parent or guardian must be ongoing or recently inflicted at the time of a petition for judicial consent. It simply means that the abuse or neglect must have been inflicted by a parent or guardian who still functions in that capacity at the time of the petition for judicial consent.

#### MATURE AND WELL INFORMED

[10] Next, we consider whether petitioner established that she “is both sufficiently mature and well-informed to decide whether to have an abortion.”<sup>13</sup> In a proceeding brought under the provisions of § 71-6901 et seq., the burden of proof on all issues rests with the petitioner, and such burden must be established by clear and convincing evidence.<sup>14</sup>

“Maturity is ‘difficult to define, let alone determine . . . .’”<sup>15</sup> But it may be measured by examining the minor’s experience, perspective, and judgment.<sup>16</sup> Matters that reflect on a pregnant minor’s experience include her prior work experience, her experience in living away from home, and her handling of personal finances.<sup>17</sup> Her perspective could be determined by looking “‘for appreciation and understanding of the relative gravity and possible detrimental impact of each available option, as well as realistic perception and assessment of possible short term and long term consequences of each of those options, particularly the abortion option.’”<sup>18</sup> As to a pregnant minor’s judgment, “‘[t]he exercise of good judgment requires being fully informed so as to be able to weigh alternatives independently and realistically.’”<sup>19</sup> In evaluating her maturity, a trial court “‘may draw inferences from the minor’s

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<sup>13</sup> See § 71-6903(2).

<sup>14</sup> *In re Petition of Anonymous 3*, *supra* note 3.

<sup>15</sup> *In re Petition of Anonymous 1*, 251 Neb. 424, 428, 558 N.W.2d 784, 787 (1997) (quoting *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979)).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> *Id.* at 429, 558 N.W.2d at 788.

<sup>19</sup> *Id.*

composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions, and her ability to articulate her reasoning and conclusions.”<sup>20</sup> The latter items are matters that we cannot discern from the cold record before us and are another reason why we elect to give weight to the fact that the trial judge heard and observed petitioner in finding her not to be mature and well informed.

[11] As is undoubtedly typical in such cases, the only testimony we have to review is that of petitioner. She will turn 17 years old in October 2013 and is unemancipated.<sup>21</sup> She testified that she mostly raised her younger siblings because her parents “were never around.” Petitioner will be a senior in high school and plans to graduate early—in December—but she did not adduce any evidence about the grades that she has received. She wants to move out of her foster parents’ house after she graduates and has saved enough money to live on her own. Petitioner has not lived on her own, and she is dependent upon her foster parents for financial support. She plans to attend college, either in December or after working for “a little bit.” Petitioner did not testify about any work experience. “‘Experience, perspective and judgment are often lacking in unemancipated minors who are wholly dependent and have never lived away from home or had any significant employment experience.’”<sup>22</sup> We find that to be true in this case.

Petitioner has engaged in counseling regarding abortion. She first testified that she had been to counseling three times, then said that she had five sessions, and later testified that she “went three times at, um, one center and then went once at another and then had two on the phone.” Petitioner’s attorney clarified that petitioner had six sessions where she either had counseling or a medical procedure. She has had three ultrasounds and has heard the unborn child’s heartbeat. She understands that an abortion would “kill the [unborn] child inside [of her].”

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<sup>20</sup> *In re Doe*, 973 So. 2d 548, 552 (Fla. App. 2008).

<sup>21</sup> See § 71-6901(5) (defining “[e]mancipated”).

<sup>22</sup> *In re Petition of Anonymous 1*, *supra* note 15, 251 Neb. at 429, 558 N.W.2d at 788.

Petitioner testified that someone discussed the risks associated with terminating a pregnancy, including bleeding and a possibility of death, but petitioner did not otherwise expound on the substance of the counseling. Nor did she elaborate on a discussion she had with a cousin's mother. She presented no evidence regarding her understanding of the emotional and psychological consequences of abortion or of the immediate and long-range implications of the procedure.

Upon our *de novo* review, we conclude that petitioner has failed to establish by clear and convincing evidence that she is sufficiently mature and well informed. Thus, petitioner failed to establish any of the statutory grounds under § 71-6903(2) or (3). But petitioner raises other issues relating to her status as a ward of the State.

#### CONSENT FOR WARD OF STATE

Petitioner asserts that as a ward of the State of Nebraska, she has the right to consent to an abortion without the consent of the Department and that the district court "failed to give the relevant regulation the proper reading."<sup>23</sup> She relies upon a provision of the Nebraska Administrative Code which states that "[i]f a ward decides to have an abortion, the consent of the parent(s) or Department is not required, but notification [by the physician or the physician's agent to the parent] may be required unless the conditions listed below exist."<sup>24</sup> We first observe that the regulation has not been amended or superseded in light of the statutory change from parental notification to parental consent. But assuming that the regulation remains effective, we find no reason to rely upon it in the case before us.

Petitioner's argument fails because (1) it was not raised before the district court, (2) petitioner invoked a statutory procedure that circumscribed the specific grounds and the authorized relief, (3) the district court's jurisdiction arose from a legislative grant and was inherently limited by that grant, and

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<sup>23</sup> Brief for petitioner at 15.

<sup>24</sup> 390 Neb. Admin. Code, ch. 11, § 11-002.04A (1998).

(4) petitioner did not seek relief in a forum where it might have been granted. We briefly discuss each problem.

[12] Although petitioner drew the district court's attention to the regulation, she did not raise it as an issue within the scope of the proceeding. Her petition made no reference to the Department. The issues in a case are framed by the pleadings.<sup>25</sup> The role of the Department was not raised by her petition, which was a standardized form. During the hearing, petitioner did offer a copy of the regulation as an exhibit and her attorney stated that "[i]t indicates it's the decision of the ward." But when asked whether she was offering it as an exhibit or "just as information" for the court, her attorney responded, "Just information for the Court or either way." Neither the exhibit nor the response illuminated any issue for the court or proposed any form of relief. This naturally followed from the limited scope of the proceeding, which we next examine.

[13] A petition for waiver of parental consent—which seeks authorization from the court to have an abortion without notarized written consent of a parent or guardian of the petitioner—is limited in scope. The scope of this special statutory proceeding is defined by §§ 71-6901, 71-6903, and 71-6904. Section 71-6901(10) defines "[p]regnant woman" as "an unemancipated woman under eighteen years of age who is pregnant or a woman for whom a guardian has been appointed pursuant to [Neb. Rev. Stat. §§] 30-2617 to 30-2629 [(Reissue 2008 & Cum. Supp. 2012)] because of a finding of incapacity, disability, or incompetency who is pregnant." There is no evidence of any appointment of a guardian for petitioner under §§ 30-2617 to 30-2629, nor does petitioner contend that she has such a guardian. Thus, § 71-6901(10) limited the availability of the procedure to "an unemancipated woman under eighteen years of age who is pregnant." Unlike the situation in *In re Petition of Anonymous 3*,<sup>26</sup> where the woman was emancipated, petitioner fell within the scope of this definition. Because petitioner met the definitional requirements, § 71-6903(2) and (3) authorized the district court to

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<sup>25</sup> *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

<sup>26</sup> *In re Petition of Anonymous 3*, *supra* note 3.

consider only three questions: (1) whether petitioner was both sufficiently mature and sufficiently well informed to decide whether to have an abortion; (2) whether there was evidence of abuse, sexual abuse, or child abuse or neglect by a parent or guardian; or (3) whether it was in her best interests to have an abortion without the consent of a parent or guardian. Whether a ward needs to obtain consent for an abortion from the Department is a matter outside the parameters carefully prescribed by § 71-6903. And § 71-6904 simply provides the appeal procedure relating to § 71-6903. If petitioner fails to prove any of the three questions authorized under § 71-6903(2) and (3), the statute specifically requires the court to “dismiss the petition.” This statute provides no mechanism for other relief.

[14-17] Because the district court’s jurisdiction of this proceeding arose from a legislative grant, it was inherently limited by the grant. In *Cummins Mgmt. v. Gilroy*,<sup>27</sup> we recognized that forcible entry and detainer is a special statutory proceeding designed to provide a speedy and summary method for an owner to regain possession of real estate. We observed that the action was a creature of the Legislature and did not exist at common law.<sup>28</sup> The district court’s jurisdiction arises out of legislative grant, and it is inherently limited by that grant.<sup>29</sup> And when a district court hears such an action, it sits as a special statutory tribunal to summarily decide the issues authorized by the statute, and not as a court of general jurisdiction with the power to hear and determine other issues.<sup>30</sup> Obviously, the subject matter of a proceeding under § 71-6901 et seq. is very different. But the legal principles are the same. Section 71-6903 is a creation of the Legislature and did not exist at common law.<sup>31</sup> The district court’s jurisdiction over

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<sup>27</sup> *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

<sup>28</sup> *Id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See, 1991 Neb. Laws, L.B. 425, § 3; *In re Petition of Anonymous I*, *supra* note 15.

proceedings pursuant to § 71-6901 et seq. arises from a legislative grant and is inherently limited by the grant. And because of the limited scope of an action pursuant to § 71-6901 et seq., in hearing such a matter, the district court acts as a special statutory tribunal to summarily decide the issues authorized by the statute. When the Legislature has expressly chosen a judicial forum for the resolution of these issues, it is not this court's province to rewrite the statute or suggest alternate or additional procedures to be utilized in this context, unless the judicial bypass statute violates the state or federal Constitution or a federal treaty.<sup>32</sup> Petitioner makes no claim that the statutory procedure violates any constitutional provision or treaty obligation, but she nevertheless seeks to expand the issues beyond those authorized by the statute. This court has no power to do so.

[18,19] This is not a situation where there is no procedure by which relief could possibly be obtained. The Legislature has authorized a declaratory judgment action.<sup>33</sup> Moreover, the equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled.<sup>34</sup> But whatever form of action might have been available to petitioner on this question, it clearly did not arise in a special statutory proceeding seeking judicial bypass of the parental consent requirement. Therefore, we do not reach the merits of this assignment of error.

#### GUARDIAN

[20] Petitioner also argues that she has no guardian. We note that the Department is the legal guardian of all children committed to it.<sup>35</sup> Petitioner points us to a statute concerning guardians of minors<sup>36</sup> and asserts that a guardian must file a petition and be appointed a guardian by a court of competent

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<sup>32</sup> *In re Petition of Anonymous 1*, *supra* note 15.

<sup>33</sup> See Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2008).

<sup>34</sup> *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998).

<sup>35</sup> See Neb. Rev. Stat. § 43-905(1) (Cum. Supp. 2012).

<sup>36</sup> Neb. Rev. Stat. § 30-2608 (Reissue 2008).

jurisdiction. She argues that there is no evidence that her foster parents took such action and that thus, they are not her guardians. But whether petitioner's foster parents are her guardians is also a matter outside the scope of this special statutory proceeding. Accordingly, we do not reach the issue in this appeal.

### CONCLUSION

We do not consider petitioner's argument that the trial judge should have recused himself, because petitioner did not ask him to do so or otherwise question his impartiality at the trial level. We hold that for a waiver of consent under the "evidence of abuse . . . or child abuse or neglect" provision of § 71-6903(3), the pregnant woman must establish that a parent or guardian, who fills that role at the time she files her petition, has abused or neglected her. Petitioner did not meet her burden to show that she is a victim of such abuse or neglect. Nor did she establish that she is sufficiently mature and well informed about abortion to have the procedure without the consent of a guardian. Because the sole issues before the district court were whether petitioner established grounds for judicial authorization of an abortion without the consent of a parent or guardian under § 71-6903(2) or (3), we do not consider whether the Department must grant or withhold consent for its ward or whether petitioner's foster parents are her guardians. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

CONNOLLY, J., dissenting.

The petitioner has no legal parents; the juvenile court terminated their parental rights. Her legal guardian, the Department—by regulation—will not give her consent. And although the district court has required her to get her foster parents' consent to obtain an abortion, their consent would be meaningless under the law because they are neither parents nor guardians. She is in a legal limbo—a quandary of the Legislature's making.

Under Neb. Rev. Stat. § 71-6902 (Cum. Supp. 2012), there are three exceptions to the requirement that a minor obtain a parent or guardian's written, notarized consent to an abortion:

Except in the case of a medical emergency or *except as provided in sections 71-6902.01, 71-6903, and 71-6906*, no person shall perform an abortion upon a pregnant woman unless, in the case of a woman who is less than eighteen years of age, he or she first obtains the notarized written consent of both the pregnant woman and one of her parents or a legal guardian . . . .

Neb. Rev. Stat. §§ 71-6902.01 and 71-6906 (Cum. Supp. 2012) are, respectively, statutory exceptions to the consent requirement for victims of abuse and medical emergencies. I agree with the majority opinion that the exception for child abuse was intended to apply to the minor's current parents or guardians. And there was not a medical emergency.

This leaves only the judicial bypass procedure under § 71-6903, which provides:

(2) If a pregnant woman elects not to obtain the consent of her parents or guardians, a judge of a district court, separate juvenile court, or county court sitting as a juvenile court shall, upon petition or motion and after an appropriate hearing, authorize a physician to perform the abortion if the court determines by clear and convincing evidence that the pregnant woman is both sufficiently mature and well-informed to decide whether to have an abortion.

Under this section, the petitioner's election not to obtain the consent of a parent or guardian is a jurisdictional prerequisite, and because such consent was impossible to obtain here, there was no election. As such, I conclude that the court lacked subject matter jurisdiction to consider the petitioner's request for judicial bypass.

We have explained that subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.<sup>1</sup> No one disputes that the district court has the power to generally hear and decide these types of cases. “‘But the question of a court's subject matter jurisdiction does not turn solely on the court's

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<sup>1</sup> See *Young v. Govier & Milone*, ante p. 224, 835 N.W.2d 684 (2013).

authority to hear a certain class of cases.’”<sup>2</sup> Instead, “[i]t also involves determining whether a court has authority to address a particular question that it assumes to decide or to grant the particular relief requested.”<sup>3</sup>

Based on the language of § 71-6903(2), the district court only “has authority . . . to grant the particular relief requested” if the petitioner has *elected* not to obtain the consent of a parent or guardian. To “elect” is to “choose.” The petitioner did not choose to forgo consent of a parent or guardian; instead, such consent was impossible for her to obtain. Obviously, the petitioner has no parents to consent because the juvenile court terminated their parental rights. And it was impossible for the petitioner to obtain the written, notarized consent of her legal guardian, the Department.

When a court terminates parental rights to a minor ward, the Department makes all the medical decisions for the ward.<sup>4</sup> Except one. The Department’s regulations show that it defers to a ward’s decision to have an abortion. So the Department effectively consents to a minor ward’s decision by default. More important here, however, its regulations prohibit a case-worker from explicitly giving or withholding consent for an abortion:

A female ward has the right to obtain a legal abortion. The decision to obtain an abortion is the ward’s. The child’s worker will provide unbiased information to the ward regarding alternatives and appropriate agencies and resources for further assistance. *The worker will not encourage, discourage, or act to prevent or require the abortion.*

If a ward decides to have an abortion, the consent of the parent(s) or Department is not required . . . .<sup>5</sup>

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<sup>2</sup> *Nebraska Republican Party v. Gale*, 283 Neb. 596, 599, 812 N.W.2d 273, 276 (2012), quoting *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011).

<sup>3</sup> *Id.*

<sup>4</sup> See, 390 Neb. Admin. Code, ch. 7, § 001.01 (1998); 390 Neb. Admin. Code, ch. 11, §§ 002.04E and 002.04F (2000).

<sup>5</sup> 390 Neb. Admin. Code, ch. 11, § 11-002.04A (1998).

As such, the petitioner could not obtain written, notarized consent from either a parent or a guardian.

The petitioner raised these points at the trial level. The petitioner's appointed attorney specifically submitted evidence showing that (1) the parents' parental rights had been terminated; (2) the juvenile court had committed the petitioner to the Department's custody; (3) the Department had placed her in a foster home under the Department's supervision; and (4) the Department will not give or withhold consent for an abortion. Given these facts, the court could not conclude that the petitioner had elected not to obtain consent. And unless a court makes this finding, there is no predicate upon which the court could exercise its jurisdiction in a judicial bypass proceeding.

Moreover, the district court was wrong to conclude that the petitioner's foster parents were "her guardian[s] for [the] purpose of consent." The petitioner's foster parents are not her guardians. The court's commitment of a child to the Department means that the Department is his or her temporary legal guardian until a permanency plan is achieved or the child reaches majority.<sup>6</sup> Nor are the petitioner's foster parents on the same level as guardians; a foster parent's rights and responsibilities in caring for a ward of the State "are derivative of and subject to the custodial authority possessed by the [state] agency."<sup>7</sup> And noticeably, the Department authorizes foster parents to obtain only routine immunizations and medical care for a foster child, under a caseworker's supervision and direction.<sup>8</sup> This means a foster parent has no authority to give consent for a foster child's abortion or any other major medical procedure.

It is not surprising that a health care provider or a pregnant minor would mistakenly conclude that she could obtain a court's authorization for an abortion when she does not have

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<sup>6</sup> See, Neb. Rev. Stat. § 43-285(1) (Cum. Supp. 2012); *In re Interest of Antonio S. & Priscilla S.*, 270 Neb. 792, 708 N.W.2d 614 (2005).

<sup>7</sup> 3 Donald T. Kramer, *Legal Rights of Children* § 29:4 at 153 (rev. 2d ed. 2005).

<sup>8</sup> See 390 Neb. Admin. Code, ch. 7, § 003.04 (2000).

a parent or guardian who can give consent. But this confusion exists because the Legislature has assumed under § 71-6902 that all minors will have a parent or guardian who *can* give consent. As this case illustrates, however, that is not always true. Here, that the petitioner has no parents and that the Department refuses to give or withhold consent for a ward's abortion creates jurisdictional problems under the written consent requirement that did not exist under the pre-2011 notification requirement. Summed up, a petitioner cannot "elect[] not to obtain" a written consent that no person or entity may legally give her. There was no triggering event to invoke the court's jurisdiction under § 71-6903(2).

But the majority opinion ignores these jurisdictional problems by not addressing the effect of the Department's regulation refusing to give or withhold consent for a minor ward's abortion. The majority opinion implies that the regulation may no longer be effective because in 2011 the Legislature changed the statutes from a requirement of parental notification to a requirement of parental consent. But even if it is effective, the majority opinion concludes it need not address the regulation's effect for these additional reasons: (1) The petitioner did not properly raise the issue to the district court; (2) the court's jurisdiction in a judicial bypass procedure is limited to the narrow issues to be decided; and (3) the petitioner did not seek relief in a proper forum. I disagree with each of these reasons.

At the outset, I note that the majority opinion incorrectly implies that the regulation is possibly ineffective because of the 2011 amendments. Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.<sup>9</sup> And we deal with the law as it is enacted and promulgated. Furthermore, because there are multiple reasons to support the regulation, this court should not implicitly conclude that the Department's decision not to change its regulations in response to the 2011 amendments is

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<sup>9</sup> *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 1631, 185 L. Ed. 2d 616 (2013).

mere inadvertence or a reason to avoid the regulation's effect in this proceeding.

It is not surprising that the Department would conclude that its consent is not required for a minor ward's abortion. The U.S. Supreme Court has held that states may impose parental consent and notification requirements on a minor seeking an abortion to ensure that an immature minor has the guidance of a parent. The rule is grounded in the constitutional protection afforded a parent's role in guiding the upbringing of his or her children.<sup>10</sup> And the absence of a parent with a recognized interest in guiding the minor's upbringing and decisionmaking negates that rationale.

Of course, even when a parent-child relationship does not exist, the State has responsibilities and legitimate interests in protecting a minor ward from harm. Moreover, the State has an interest in ensuring that her decision has not been coerced and in determining whether her pregnancy is the result of a sexual assault or child abuse. These concerns are obviously relevant to whether an abortion is in a minor's best interests under § 71-6903(3). And determining the petitioner's best interests was further complicated by her lack of a permanent family's support.

The Department, however, has abdicated its role in determining these issues. And despite the State's interest in protecting a minor ward's well-being, there are at least two reasons (and probably others) that the Department would nonetheless decline to advise a ward or consent to an abortion. Commentators have pointed out that state agencies frequently will not authorize an abortion for minor wards because no federal funding is available for the procedure or out of concerns that caseworkers will impose their own biases.<sup>11</sup>

As to the majority opinion's first reason for not relying on the regulation, this court cannot ignore jurisdictional problems because they were not raised in the "pleadings." An

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<sup>10</sup> See *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

<sup>11</sup> See Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 Harv. J.L. & Gender 175 (2011).

appellate court has the duty to determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed.<sup>12</sup> Furthermore, the pleading for a judicial bypass is a form with blanks and checkmarks. It is intended to be a simple filing that a minor can navigate. The court does not appoint an attorney for the minor until after the minor files the petition. There is no place on this form for a petitioner to raise jurisdictional problems. And requiring a minor to meet the pleading standards of an attorney would likely place unconstitutional burdens on a minor seeking an abortion.<sup>13</sup>

As to the majority opinion's second reason for not relying on the regulation, the majority cannot avoid jurisdictional issues on the ground that a statutory proceeding is limited in the issues to be decided. Again, an appellate court has the duty to determine whether the lower court had the power to enter the judgment or other final order sought to be reviewed.<sup>14</sup> And a court's authority to act is never outside the scope of any proceeding.

And, finally, as to the majority's third reason for not relying on the regulation, this is the proper forum to determine the effect of the Department's regulation. As noted above, whether the petitioner's legal guardian can provide written, notarized consent for her abortion is a jurisdictional prerequisite for the court to entertain her request for judicial bypass. Furthermore, the majority's suggestion that the petitioner should have filed a declaratory judgment action to raise the consent issue ignores constitutional requirements. States that require parental notification or consent for an abortion are constitutionally required to provide expeditious proceedings for minors who claim that they do not need consent.<sup>15</sup> The Legislature has enacted the statutes in article 69 of chapter 71 of the Nebraska Revised Statutes specifically to create a cost-free and expeditious

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<sup>12</sup> See *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

<sup>13</sup> See *Bellotti*, *supra* note 10.

<sup>14</sup> See *Smith*, *supra* note 12.

<sup>15</sup> See *Bellotti*, *supra* note 10.

proceeding. Declaratory judgment actions obviously do not fit that description.

Because the petitioner never “elect[ed]” not to get the consent of a parent or a guardian to seek an abortion, the court did not have jurisdiction to entertain her request for judicial bypass under § 71-6903(2). I realize that this conclusion means that none of the statutory exceptions apply and that under § 71-6902, the petitioner is prohibited from obtaining an abortion. An absolute ban on the petitioner’s right to seek an abortion obviously raises constitutional concerns. But the petitioner did not challenge the statutes as unconstitutional.

McCORMACK, J., joins in this dissent.

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IN RE GUARDIANSHIP OF BRYDON P., A CHILD  
UNDER 18 YEARS OF AGE.

SILVIJA P., APPELLEE AND CROSS-APPELLANT, v. ERIC L.,  
INTERVENOR-APPELLANT AND CROSS-APPELLEE.

838 N.W.2d 262

Filed October 11, 2013. No. S-12-1065.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Attorney Fees: Appeal and Error.** A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.
3. \_\_\_\_: \_\_\_\_\_. When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion.
4. **Attorney Fees.** Whether attorney fees are authorized by statute or by our recognition of a uniform course of procedure presents a question of law.
5. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When an appellate court judicially construes a statute and that construction fails to evoke an amendment, the court presumes that the Legislature has acquiesced in its determination of the Legislature’s intent.
6. **Guardians and Conservators: Minors: Attorney Fees.** When a court determines that a petitioner seeks a guardianship appointment for a minor in good faith and that the guardianship is in the minor’s best interests, the court is statutorily authorized to assess a successful petitioner’s reasonable costs, including attorney fees, against the minor’s estate, if an estate exists. In such cases, the

authorizing statute for the assessment is Neb. Rev. Stat. § 30-2613(1)(b) (Cum. Supp. 2012).

7. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Under Nebraska's guardianship statutes for minors, a county court is not authorized to assess attorney fees against another party.
8. **Courts: Jurisdiction: Equity.** Although county courts lack general equity jurisdiction, they may apply equitable principles to matters that are within their exclusive jurisdiction.
9. **Actions: Parent and Child: Child Custody: Visitation: Standing.** In the context of a court action in which a nonparent seeks custody or visitation with the child, in loco parentis is a standing doctrine. Its application depends upon the circumstances in existence when the nonparent claims a child's best interests lie in allowing him or her to exercise parental rights.
10. **Parent and Child.** Once a person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis. Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby.
11. **Parent and Child: Guardians and Conservators: Minors: Child Custody: Standing.** Because the in loco parentis doctrine is transitory, whether a person seeking guardianship of a minor should have standing to maintain custody if the minor's biological parent ever seeks custody in the future is an issue that cannot be decided in advance of any dispute.

Appeal from the County Court for Sarpy County: TODD J. HUTTON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings on the issue of fees.

Molly M. Blazek, of Law Office of Molly M. Blazek, for intervenor-appellant.

Amy Sherman and William D. Gilner, of Sherman & Gilner, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LEMAN, and CASSEL, JJ.

CONNOLLY, J.

### SUMMARY

After Brydon P.'s mother died, the county court appointed the appellee, Silvija P., to be his permanent guardian. Silvija is Brydon's maternal grandmother. The appellant, Eric L., is Brydon's adjudicated father. The court allowed Eric to intervene. Although it appointed Silvija as Brydon's permanent guardian, it rejected her request for permanent in loco parentis

status. The court awarded Silvija attorney fees and assessed them equally to Brydon's estate and Eric.

In Eric's appeal, we are asked to decide whether, in a guardianship proceeding, a county court can assess a petitioner's attorney fees against another party. In Silvija's cross-appeal, the issue is whether a court can confer permanent in loco parentis status to a party. We conclude that in a guardianship proceeding for a minor, a court cannot assess a petitioner's costs against another party. Nor does the record show that the court awarded fees under Neb. Rev. Stat. § 25-824 (Reissue 2008). We therefore reverse that part of the court's order that assessed Silvija's attorney fees against Eric and remand the cause for further proceedings. But we affirm the court's determination that it could not confer permanent in loco parentis status to Silvija.

### BACKGROUND

Brydon was born in 1999. Eric and Brydon's mother, Nicole L., never married, and Eric does not have a familial relationship with Brydon. But he has paid court-ordered child support of \$201 per month for Brydon since 2000.

Silvija provided financial support and childcare for Brydon until Nicole married in 2010. Silvija continued to see Brydon at least weekly after Nicole married.

In September 2011, Nicole and her husband were severely injured in a vehicle accident and they were both hospitalized. A few days after the accident, Silvija petitioned for an emergency, temporary guardianship of Brydon.

Nicole died on October 9, 2011. She had not designated a guardian for Brydon in a will. After Eric received notice of Silvija's guardianship request, he asked to intervene and for therapeutic visitation and the appointment of a guardian ad litem to represent Brydon's interests. Therapeutic visitation referred to an opportunity for Eric to establish a relationship with Brydon.

The court allowed Eric to intervene and appointed a guardian ad litem for Brydon. The court ordered Brydon and Eric to be evaluated by a child therapist to determine whether their introduction should occur and, if so, how to proceed. At a

February 2012 status hearing, the court continued the temporary guardianship and permitted therapeutic visits if the therapist and guardian ad litem approved them.

In June 2012, Silvija filed an “Amended Petition for Adoption or in the Alternative for In Loco Parentis Status and Custody or in the Alternative for Guardianship.” Silvija alleged that Eric had not sought any relief since the court had allowed him to intervene and that he had never met Brydon. She asked the court to find that Eric had forfeited his parental rights and that it was in Brydon’s best interests to terminate Eric’s rights and to allow Silvija to adopt him. Silvija requested that the court alternatively find that she stood in loco parentis to Brydon and grant her sole legal custody and control of him, and “terminate the guardianship having found her to be [Brydon’s] parent.” As a third alternative, Silvija requested appointment as Brydon’s permanent guardian.

In July 2012, the court issued an order rejecting Silvija’s request for adoption because she had not complied with the statutory requirements or paid the filing fee. The court accepted the amended petition only to consider her requests for alternative relief: a finding that she stood in loco parentis to Brydon or that she should be his permanent guardian. It also appointed an attorney for Brydon. In his answer, Eric responded that he had diligently participated with the therapist and attempted to make contact with Brydon and provide care.

In August 2012, Eric did not appear for a deposition. The record contains e-mails between the attorneys that show when the first therapeutic visit was scheduled between Eric and Brydon, Silvija and Brydon arrived at the therapist’s office early. When Brydon saw Eric outside the building, he did not want to meet him. After Brydon’s court-appointed attorney informed Eric that Brydon did not want to meet him, Eric decided not to contest the guardianship. On the morning of the scheduled deposition, Eric’s attorney e-mailed Silvija’s attorney that he would not appear. She stated that Eric would withdraw his petition and not contest the guardianship if the parties agreed to make his contact information available to Brydon for a future contact if Brydon changed his mind.

Eric did not appear at the trial on Silvija's amended petition, but his attorney did. The parties stipulated that the court should appoint Silvija as Brydon's permanent guardian. But they disputed the legality of her request for in loco parentis status. In addition, they disputed whether the court had authority to award Silvija attorney fees. The court continued the temporary guardianship, gave the parties an opportunity to submit briefs, and took the matter under advisement.

The court appointed Silvija to be Brydon's permanent guardian. In a separate order, it addressed Silvija's request for in loco parentis status, custody, and fees. The court found that Eric had paid his child support but had not established a familial relationship with Brydon and had never sought custody or visitation before the guardianship proceeding. But the court stated that Silvija's argument—i.e., Eric's parental rights should be terminated—presumed that he was resisting the guardianship, which was not the case. The court concluded that it could decide the guardianship issues without deciding whether Eric had forfeited his parental rights. It denied Silvija's request "to be declared in loco parentis and thereby obtain sole care, custody and control of the minor child over the objection of his natural father." It stated that only the issue of guardianship was presented because there was no pending custody dispute.

The court concluded that in cases involving minor children, as distinguished from incapacitated persons, Nebraska's statutes do not authorize an assessment of fees for a court-appointed attorney or guardian ad litem. But under *In re Guardianship & Conservatorship of Donley (Donley)*,<sup>1</sup> the court concluded that such costs are compensable from the protected person's estate. The court concluded that like the statute we relied on in *Donley*, Neb. Rev. Stat. § 30-2613(1)(b) (Cum. Supp. 2012) authorizes a guardian to use a ward's funds for his or her support, care, and education. It concluded that § 30-2613(1)(b) authorized the assessment of costs and fees from the minor's estate.

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<sup>1</sup> *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001).

Based on this reasoning, the court awarded fees to Brydon's guardian ad litem, Brydon's attorney, and Silvija's attorney. The court ordered Eric and Brydon's estate to each pay one-half of these fees. The court awarded fees of \$8,882.50 to Silvija's attorney, and Eric's share of the fees was \$4,441.25.

### ASSIGNMENTS OF ERROR

Eric assigns that the court erred in awarding attorney fees to Silvija's attorney, to be paid by Brydon's estate and Eric. On cross-appeal, Silvija assigns that the court erred in denying her request for in loco parentis status.

### STANDARD OF REVIEW

[1] We independently review questions of law decided by a lower court.<sup>2</sup>

### ANALYSIS

#### ATTORNEY FEES IN GUARDIANSHIP PROCEEDINGS

Eric argues that the court incorrectly awarded attorney fees for Silvija's attorney because there is no statutory authority or recognized procedure for allowing attorney fees for a petitioner's attorney in a guardianship proceeding. Silvija argues that the award was authorized by § 25-824 and Neb. Rev. Stat. §§ 30-2620 (Cum. Supp. 2012) and 30-2643 (Reissue 2008).

[2-4] We pause here to clarify the nature of the issue because the parties have expressed confusion about our standard or review. A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when we have recognized and accepted a uniform course of procedure for allowing attorney fees.<sup>3</sup> When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling we will not disturb on appeal unless the court abused its discretion.<sup>4</sup> But whether attorney fees are

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<sup>2</sup> *Pinnacle Enters. v. City of Papillion*, ante p. 322, 836 N.W.2d 588 (2013).

<sup>3</sup> *Vlach v. Vlach*, ante p. 141, 835 N.W.2d 72 (2013).

<sup>4</sup> See, *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005); *Donley*, supra note 1; *Winter v. Department of Motor Vehicles*, 257 Neb. 28, 594 N.W.2d 642 (1999).

authorized by statute or by our recognition of a uniform course of procedure presents a question of law.<sup>5</sup>

Both parties incorrectly argue that § 30-2643 governs an award of costs and fees in a guardianship proceeding for a minor. Article 26 of the Nebraska Probate Code deals with the protection of minors and persons under a disability. Article 26 has three distinct sections of statutes that apply respectively to (1) a conservatorship proceeding for a person under a disability or a minor,<sup>6</sup> (2) a guardianship proceeding for an incapacitated person,<sup>7</sup> and (3) a guardianship proceeding for a minor.<sup>8</sup> Section 30-2643 authorizes a court to assess costs and fees for a court-appointed person in a conservatorship proceeding. But it does not apply here because it is not a conservatorship proceeding.

In guardianship proceedings, the statutory authorization for an assessment of fees and costs is inconsistent. In a guardianship proceeding for an incapacitated person, § 30-2620.01 authorizes a court to assess and adjust reasonable fees and costs for an attorney, a guardian ad litem, a physician, and a visitor “appointed by the court for the person alleged to be incapacitated.” The court may assess fees and costs against the estate of the person who is the subject of the proceeding, if the person has an estate; a petitioner; or in some cases, the county.<sup>9</sup> But in a guardianship proceeding for a minor,<sup>10</sup> the court correctly concluded that the probate statutes authorized a court only to *appoint* an attorney and guardian ad litem for a minor whose interests may be inadequately represented.<sup>11</sup>

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<sup>5</sup> See, *Donley*, *supra* note 1; *Winter*, *supra* note 4.

<sup>6</sup> Neb. Rev. Stat. §§ 30-2630 to 30-2661 (Reissue 2008 & Cum. Supp. 2012).

<sup>7</sup> Neb. Rev. Stat. §§ 30-2617 to 30-2629 (Reissue 2008 & Cum. Supp. 2012).

<sup>8</sup> Neb. Rev. Stat. §§ 30-2605 to 30-2616 (Reissue 2008 & Cum. Supp. 2012).

<sup>9</sup> See, § 30-2620.01; *In re Guardianship of Suezanne P.*, 6 Neb. App. 785, 578 N.W.2d 64 (1998).

<sup>10</sup> See §§ 30-2605 to 30-2616.

<sup>11</sup> See, Neb. Rev. Stat. § 30-2222(4) (Reissue 2008); § 30-2611(d).

No statute explicitly authorizes a court to assess the fees and costs of appointed persons against the ward's estate, a petitioner, or the county.

Similarly, none of the statutes in article 26 regarding conservatorships and guardianships explicitly authorize a court to assess a petitioner's attorney fees against the estate. For conservatorship and guardianship cases, however, we have recognized a course of procedure for assessing a successful petitioner's costs against the estate.

In *Donley*,<sup>12</sup> we concluded that public policy demanded compensation for a petitioner's costs in initiating a guardianship or conservatorship proceeding in good faith for the benefit of a person alleged to be in need of protection. We reasoned that in these proceedings, the petitioners are usually acting on behalf of persons who are unable to take actions to protect themselves and often unable to give informed consent to the action. We further reasoned that for persons who are in need of protection, the State and society have a strong interest in placing them and their estates under a court's supervision. And this protection is dependent upon the ability of someone to initiate a proceeding on behalf of the person in need.

We held that when a court determines that a guardianship or conservatorship appointment is necessary for a person alleged to be in need of protection, the reasonable costs of initiating a good faith petition, including attorney fees, constitute necessary expenditures for the person's support or benefit, which costs may be assessed against the person's estate. Moreover, in conservatorship cases, we held that this assessment is statutorily authorized by § 30-2654(a)(2), which allows a conservator "to expend or distribute sums [from the estate] reasonably necessary for the support, education, care or benefit of the protected person."

Under the guardianship statutes pertaining to minors, § 30-2613(1)(b) permits a guardian to receive money payable to a ward and spend these funds for the ward's support, care, and education. The court correctly determined that

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<sup>12</sup> *Donley*, *supra* note 1.

§ 30-2613(1)(b) mirrors § 30-2654(a)(2), the statute that we construed in *Donley*.

[5] We decided *Donley* in 2001, and the Legislature has not amended any statutes in article 26 in response to *Donley*. When an appellate court judicially construes a statute and that construction fails to evoke an amendment, we presume that the Legislature has acquiesced in our determination of the Legislature's intent.<sup>13</sup> We conclude that our reasoning in *Donley* applies here also.

[6] We hold that when a court determines that a petitioner seeks a guardianship appointment for a minor in good faith and that the guardianship is in the minor's best interests, the court is statutorily authorized to assess a successful petitioner's reasonable costs, including attorney fees, against the minor's estate, if an estate exists. In such cases, the authorizing statute for the assessment is § 30-2613(1)(b). A court may also assess the minor's attorney fees and guardian ad litem fees against his or her estate when the court has determined that these appointments are necessary to ensure that the minor's interests are adequately represented.

But *Donley* did not authorize an assessment of a successful petitioner's costs against another party. Permitting a court to assess a petitioner's costs against other parties could inhibit them from intervening or objecting. And in a guardianship proceeding for a minor, a county court must also hear from others who may have rights at stake or who have genuine concerns about the minor's best interests. Nor is an assessment against other parties consistent with § 30-2613(1)(b)'s authorization for a guardian to spend funds from a ward's estate for the ward's benefit.

[7] Outside of § 30-2613(1)(b), no statute or recognized course of procedure authorizes fees or costs to be assessed against anyone in a guardianship proceeding for a minor. We conclude that the court erred in extending our reasoning in *Donley* to other parties. Under Nebraska's guardianship

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<sup>13</sup> See *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013).

statutes for minors, a county court is not authorized to assess attorney fees against another party.

Alternatively, Silvija relies on *In re Guardianship of Bremer*.<sup>14</sup> There, after an elderly ward died, the guardian filed his final accounting and asked to be discharged. One of the ward's children objected and asked the court to assess surcharges against the guardian for his alleged breaches of fiduciary duties while he was the conservator. The guardian successfully defended his actions, but the court disallowed attorney fees because the defense was personal to the guardian.

We reversed. We concluded that because the guardian had been the conservator, he was acting as a special conservator for the estate, and that § 30-2643 authorized an assessment of his fees. We further stated that even apart from § 30-2643, a court may allow a guardian attorney fees necessarily incurred in preparing a final account if he successfully defends it against objectors. We reasoned that “[t]o make a fiduciary personally responsible for all attorney fees reasonably incurred in the successful defense of his actions as fiduciary would impose an unconscionable burden on fiduciary service without justification.”<sup>15</sup>

*In re Guardianship of Bremer* does not apply here. Section 30-2643 applied to that guardianship proceeding only because the guardian was also acting as a special conservator. Moreover, Silvija did not incur attorney fees because she was defending her actions as a fiduciary. The court had not appointed her when she incurred these fees. And even if she were entitled to attorney fees under *In re Guardianship of Bremer*, we held that the attorney fees were to be assessed against the ward's estate. So this decision does not authorize an assessment against other parties even if it were factually on point.

Finally, Silvija argues that she is entitled to attorney fees under § 25-824, even though she did not claim that Eric's petition to intervene was frivolous. Eric correctly contends that Neb. Rev. Stat. § 25-824.01 (Reissue 2008) requires a

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<sup>14</sup> *In re Guardianship of Bremer*, 209 Neb. 267, 307 N.W.2d 504 (1981).

<sup>15</sup> *Id.* at 275, 307 N.W.2d at 509.

court to specifically state the reason for an award of attorney fees under § 25-824, and the court did not do this. But Silvija argues that because Eric failed to appear at his deposition and at trial, the court could have concluded that he had acted in bad faith. She argues that the court's failure to make specific findings about this conduct is only a reason to remand the cause.

We disagree. Silvija submitted an affidavit with her attorney fees listed. The court awarded the exact amount of attorney fees that Silvija requested, and she did not request fees under § 25-824. This argument is without merit. We conclude that the court erred in assessing Silvija's attorney fees against Eric.

But we conclude that the issue must be remanded to the court for further proceedings. As stated, the court awarded fees of \$8,882.50 to Silvija's attorney. It incorrectly assessed \$4,441.25 of these fees against Eric. On remand, the court must determine whether to assess all or any part of the incorrectly assessed fees against Brydon's estate. In doing so, the court should consider the usual factors for determining reasonable attorney fees, which we set out in *Donley*. In addition, of course, under § 30-2613(1)(b), the court must consider whether a further assessment of costs against Brydon's estate would be detrimental to his long-term interests.

#### IN LOCO PARENTIS DOCTRINE

On cross-appeal, Silvija argues that the county court had jurisdiction to grant her request for in loco parentis status and that it erred in failing to grant this request. She relies on changes to jurisdictional statutes that give county courts concurrent jurisdiction over domestic relations cases. But Eric had not commenced a custody proceeding, and he stipulated to her appointment as Brydon's guardian. So even if a court can recognize a petitioner's in loco parentis status in some guardianship cases to contest a natural parent's request for custody—an issue we do not decide—this guardianship proceeding did not involve a custody dispute. We conclude that a county court's jurisdiction to resolve custody disputes was irrelevant to the court's authority to act here.

Eric argues that because the county court lacks equity jurisdiction, it could not grant Silvija's request for in loco parentis status. He relies on our explanation in *Latham v. Schwerdtfeger*<sup>16</sup> that the in loco parentis doctrine is a common-law doctrine. We did not explicitly state in *Latham* that in loco parentis is an equitable remedy or doctrine, but other courts have done so, including one of the courts that we cited with approval in *Latham*.<sup>17</sup> But even if recognizing a party's in loco parentis relationship to a child is an equitable doctrine, that conclusion would not mean that the court lacked jurisdiction to do so here.

[8] Although county courts lack general equity jurisdiction, they may apply equitable principles to matters that are within their exclusive jurisdiction.<sup>18</sup> Under Neb. Rev. Stat. § 24-517(2) (Cum. Supp. 2012), unless a juvenile court has acquired jurisdiction over a child in need of a guardian, a county court has exclusive jurisdiction over all matters relating to a guardianship. So the issue here is not whether the court has jurisdiction to recognize a petitioner's in loco parentis status in a guardianship proceeding. The issue is whether a court can confer permanent in loco parentis status.

Silvija clearly did not need the court to recognize her in loco parentis relationship with Brydon for her to have standing to seek appointment as his guardian. And the court's appointment of her as Brydon's guardian forestalled any need for the court to consider whether it should recognize her in loco parentis status. Under the court's order, she obviously has legal and physical custody. Instead, Silvija is seeking permanent parental status under the doctrine. The court correctly concluded that it cannot confer permanent in loco parentis status.

In *Latham*,<sup>19</sup> we applied the in loco parentis doctrine in a custody dispute involving two unmarried domestic partners

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<sup>16</sup> *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011).

<sup>17</sup> See *id.*, citing *Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419 (1995).

<sup>18</sup> See *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007).

<sup>19</sup> *Latham*, *supra* note 16.

who had separated. We held that the plaintiff had standing under the doctrine to seek custody and visitation of the child born to the other partner during the parties' relationship. We explained that in loco parentis is a common-law doctrine that gives standing to a nonparent to exercise the rights of a natural parent when the evidence shows that the nonparent's exercise of such rights is in the child's best interests. The evidence must show that the nonparent has established an intimate parent-child relationship and assumed the obligations of that relationship. We discussed earlier cases in which we had applied the doctrine, including a case affirming an award of visitation to a child's ex-stepparent.<sup>20</sup> We quoted with approval another court's explanation of the doctrine:

"[W]hile it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that *the third party be granted standing* so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objection."<sup>21</sup>

We explained that when "viewed in the context of standing principles in general, [the doctrine's] purpose is to ensure that actions are brought only by those with a genuine substantial interest."<sup>22</sup> We concluded that the nonparent had standing to seek custody and visitation, and we reversed the district court's summary judgment for the parent because the parties were not coparenting at the time of the hearing. We remanded the cause with instructions for the court to focus on the child's best interests in maintaining the relationship with the

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<sup>20</sup> See *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).

<sup>21</sup> *Latham*, *supra* note 16, 282 Neb. at 130, 802 N.W.2d at 74 (emphasis supplied).

<sup>22</sup> *Id.*

nonparent and on the nature of that relationship after the parties' separation.

[9,10] Our discussion in *Latham* shows that in the context of a court action in which a nonparent seeks custody or visitation with the child, in loco parentis is a standing doctrine. Its application depends upon the circumstances in existence when the nonparent claims a child's best interests lie in allowing him or her to exercise parental rights. But we have specifically stated that "[o]nce the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis. . . . Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby."<sup>23</sup> For example, we have held that a court could not order a child's ex-stepfather to pay child support after he was no longer discharging the daily duties of a parent.<sup>24</sup>

[11] Presumably, in Silvija's role as Brydon's guardian, she will continue to perform the parental obligations that she had assumed before the appointment. But because the in loco parentis doctrine is transitory, whether a person seeking guardianship of a minor should have standing to maintain custody if the minor's biological parent ever seeks custody in the future is an issue that cannot be decided in advance of any dispute. We conclude that the court did not err in rejecting Silvija's request for permanent parental status.

### CONCLUSION

We conclude that the court correctly denied Silvija's request for permanent parental status under the doctrine of in loco parentis.

But we conclude that the court erred in assessing Silvija's attorney fees against Eric. In a guardianship proceeding for a minor, no statute or recognized course of action permits a court to assess a petitioner's costs against another party. We reverse that portion of the court's order. We remand

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<sup>23</sup> *In re Interest of Destiny S.*, 263 Neb. 255, 261, 639 N.W.2d 400, 406 (2002).

<sup>24</sup> See *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000).

the cause, however, for the court to determine whether to assess all or any part of the incorrectly assessed fees against Brydon's estate.

AFFIRMED IN PART, AND IN PART REVERSED  
AND REMANDED FOR FURTHER PROCEEDINGS  
ON THE ISSUE OF FEES.

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DAVID J. KLINGELHOEFER, AS SUCCESSOR TRUSTEE OF THE  
CONSTANCE K. KLINGELHOEFER REVOCABLE TRUST AND  
AS MANAGER OF CONSTANCE KLINGELHOEFER, L.L.C.,  
APPELLEE, v. KERRY L. MONIF ET AL., APPELLANTS.

839 N.W.2d 247

Filed October 11, 2013. No. S-12-1117.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
2. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
3. **Courts: Judgments: Appeal and Error.** A district court has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court.
4. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. The judgment of the appellate court is a final judgment in the cause, and the entry thereof in the lower court is a purely ministerial act.
5. **Judgments.** After a mandate is issued, no modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it.
6. \_\_\_\_\_. A mandate is conclusive on the parties, and no judgment or order different from, or in addition to, the mandate can have any effect.
7. **Attorney Fees: Appeal and Error.** An appellate court may award attorney fees on appeal regardless of whether they were requested or ordered in the trial court.
8. **Attorney Fees: Words and Phrases.** In the context of Neb. Rev. Stat. § 25-824 (Reissue 2008), a frivolous action is one in which a litigant asserts a legal position so wholly without merit as to be ridiculous.
9. **Actions.** Any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGL, Judge. Vacated and dismissed.

David J. Lanphier, of Broom, Clarkson, Lanphier & Yamamoto, for appellants.

Daniel E. Klaus, of Rembolt Ludtke, L.L.P., for appellee.

WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-  
LERMAN, JJ.

McCORMACK, J.

### NATURE OF CASE

David J. Klingelhoef, as successor trustee of the Constance K. Klingelhoef Revocable Trust (Trust) and as manager of Constance Klingelhoef, L.L.C. (LLC), filed a declaratory action with the district court. Constance K. Klingelhoef's other children, as beneficiaries of the Trust and members of the LLC (the beneficiaries), filed counterclaims for a declaratory judgment and for an accounting. The district court entered judgment for David on the declaratory judgment actions and held a trial for an accounting. After trial, the district court generally found in favor of David. The beneficiaries appealed, and the Nebraska Court of Appeals affirmed in an unpublished memorandum opinion.<sup>1</sup> After the Court of Appeals issued its mandate, David moved for attorney fees and postjudgment interest and the district court entered an order in his favor. The beneficiaries now appeal.

### BACKGROUND

In the first appeal, the Court of Appeals set out the following facts, which have been relied upon and summarized for purposes of this appeal: Constance was the mother of 11 children. Before her death in 2006, Constance executed a number of documents to effect an estate. To reduce taxes, she created the LLC and transferred her real estate to the LLC. She gave interests in the LLC to each of her 11 children and kept an interest for herself. To avoid probate, Constance created a trust. Constance also created a will, directing that upon her death, any remaining real or personal property in her possession be transferred to the Trust.

After her death, her son David, as trustee of the Trust and as manager of the LLC, brought an action seeking a

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<sup>1</sup> *Klingelhoef v. Monif*, No. A-11-056, 2012 WL 148730 (Neb. App. Jan. 17, 2012) (selected for posting to court Web site).

declaratory judgment which would allow the sale of the real estate pursuant to “Article Fourth” of the Trust. The beneficiaries brought counterclaims for a finding that provisions of the LLC should govern disposition of the real property and requested an accounting. Both parties moved for summary judgment on the question of whether the Trust document or the LLC document should govern disposition of the real property.

The district court found that the only construction of the Trust and LLC documents that would effectuate Constance’s intent would be for the terms of the Trust to control the disposition. The case proceeded to trial on the request for an accounting. The court found that David did not engage in self-dealing and that he did not breach his fiduciary duties. In particular, the court found that David did not breach his fiduciary duty by charging the Trust and LLC for the attorney fees he incurred in pursuing the declaratory judgment and defending the accounting claims. The beneficiaries appealed and posted a supersedeas bond.

In an unpublished opinion, the Court of Appeals affirmed. On April 4, 2012, the Court of Appeals issued its mandate. The mandate stated that “the judgment which you [the district court] rendered has been affirmed by the Court of Appeals.” Furthermore, the mandate ordered that the district court “shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.”

On April 9, 2012, David filed with the district court a motion for an award of costs, expenses, and attorney fees against the beneficiaries under Neb. Rev. Stat. §§ 25-1705 et seq. (Reissue 2008 & Cum. Supp. 2012) and 25-1914 to 25-1918 and 30-3893 (Reissue 2008). The motion further requested payment out of the supersedeas bond and, if that was inadequate, then for judgment against the beneficiaries.

A hearing was held on the motion on July 6, 2012. David offered into evidence the affidavit of his attorney, which addressed the costs and attorney fees incurred during the lawsuit, and the affidavit of a certified public accountant, which addressed the damages suffered by the extended delay in the sale of the real estate. In response, the beneficiaries offered

the affidavit of a certified public accountant in opposition to the accountant's affidavit offered by David.

On October 29, 2012, the district court issued its order. The district court found that the request being made to recover attorney fees, expenses, and interest was proper under § 30-3893. It also found that the sale of property was in fact delayed because of the continuing litigation of the beneficiaries. The court awarded David postjudgment interest in the amount of \$80,531.35, costs in the amount of \$818.40, and reasonable attorney fees in the amount of \$164,728.86. The beneficiaries now appeal.

### ASSIGNMENTS OF ERROR

The beneficiaries have assigned, restated and summarized, that the district court erred in (1) awarding David costs, expenses, and attorney fees for the trial and appeal after the mandate from the Court of Appeals; (2) granting interest, costs, expenses, and attorney fees at a hearing on the supersedeas bond which exceeds the terms of the coverage under applicable law; and (3) not granting the beneficiaries' request for attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2008) for David's filing of the postjudgment motion for attorney fees and costs, which they contend was frivolous.

### STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.<sup>2</sup>

### ANALYSIS

The beneficiaries argue that the district court erred when it awarded David costs, expenses, and attorney fees for the trial and appeal because the request was made after the Court of Appeals had filed its mandate. We agree.

[2-6] We have stated that after receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.<sup>3</sup> A district court

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<sup>2</sup> *Gabel v. Polk Cty. Bd. of Comrs.*, 269 Neb. 714, 695 N.W.2d 433 (2005).

<sup>3</sup> *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court.<sup>4</sup> The judgment of the appellate court is a final judgment in the cause, and the entry thereof in the lower court is a purely ministerial act.<sup>5</sup> No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it.<sup>6</sup> That order is conclusive on the parties, and no judgment or order different from, or in addition to, the mandate can have any effect.<sup>7</sup>

Here, the issue is whether the award of costs, expenses, and attorney fees was outside the scope of the mandate. The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.<sup>8</sup> The mandate given by the Court of Appeals is clear; the district court's judgment had been affirmed. The district court was to enter judgment in conformity with the Court of Appeals' judgment and opinion, without delay. The Court of Appeals did not award the costs, postjudgment interest, and attorney fees requested by David. Therefore, David's motion was attempting to obtain further relief, which he had not previously requested from the district court or the Court of Appeals. As we stated in *VanHorn v. Nebraska State Racing Comm.*,<sup>9</sup> when a request for damages, costs, and fees is outside the mandate of the appellate court, the district court lacks jurisdiction to rule on such a motion.

The district court was, therefore, without jurisdiction to consider the motion and should have dismissed it without

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<sup>4</sup> See *Custom Fabricators v. Lenarduzzi*, 259 Neb. 453, 610 N.W.2d 391 (2000).

<sup>5</sup> See *K N Energy, Inc. v. Cities of Broken Bow et al.*, 248 Neb. 112, 532 N.W.2d 32 (1995).

<sup>6</sup> *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007).

<sup>7</sup> *Id.*

<sup>8</sup> *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001).

<sup>9</sup> *VanHorn*, *supra* note 6.

prejudice.<sup>10</sup> If David had a further cause of action arising out of the Court of Appeals' decision, he needed to file a new lawsuit and present evidence in that case.<sup>11</sup> He may not, however, simply extend his request for relief beyond that which was initially determined by the Court of Appeals.<sup>12</sup> Therefore, we vacate the October 29, 2012, order granting David costs, expenses, and attorney fees.

[7] Finally, we must also address whether the motion filed by David was frivolous. On appeal, the beneficiaries moved this court for an award of attorney fees pursuant to § 25-824, claiming that David's motion for costs, expenses, and attorney fees was wholly without merit. Although the beneficiaries did not seek attorney fees at the hearing before the district court, an appellate court may award attorney fees on appeal regardless of whether they were requested or ordered in the trial court.<sup>13</sup>

[8,9] Section 25-824 provides generally that a court can award reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith.<sup>14</sup> In the context of § 25-824, a frivolous action is one in which a litigant asserts a legal position so wholly without merit as to be ridiculous.<sup>15</sup> Any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.<sup>16</sup> Sanctions should not be imposed except in the clearest cases.<sup>17</sup>

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<sup>10</sup> See *State v. Shelly*, 279 Neb. 728, 782 N.W.2d 12 (2010).

<sup>11</sup> *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982).

<sup>12</sup> *Id.*

<sup>13</sup> See *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998).

<sup>14</sup> *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

<sup>15</sup> See *Chicago Lumber Co. of Omaha v. Selvera*, 282 Neb. 12, 809 N.W.2d 469 (2011).

<sup>16</sup> *Id.*

<sup>17</sup> *First Nat. Bank v. Chadron Energy Corp.*, 236 Neb. 199, 459 N.W.2d 736 (1990).

Here, David's motion was without merit because the district court lacked jurisdiction. But, the fact that the district court granted David's motion indicates that such a legal position should not be deemed frivolous. We conclude that the motion was not brought in bad faith. We decline to award attorney fees on appeal to the beneficiaries on the ground that the motion was frivolous.

### CONCLUSION

For the reasons discussed, we vacate the district court's order granting David costs, expenses, and attorney fees and deny the beneficiaries' request for attorney fees pursuant to § 25-824.

VACATED AND DISMISSED.

HEAVICAN, C.J., and CASSEL, J., not participating.

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STATE OF NEBRASKA, APPELLEE, v.  
VENCIL LEO ASH III, APPELLANT.  
838 N.W.2d 273

Filed October 18, 2013. No. S-12-753.

1. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2012), and the trial court's decision will not be reversed absent an abuse of discretion.
5. **Constitutional Law: Criminal Law: Pretrial Procedure: Evidence.** A criminal defendant has constitutional and statutory rights which mandate the timely disclosure of the State's evidence in a criminal case.

6. **Pretrial Procedure: Evidence.** Neb. Rev. Stat. § 29-1912(2) (Cum. Supp. 2012) requires the State, upon request, to disclose evidence that is material to the preparation of a defense.
7. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
8. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.

Appeal from the District Court for Kimball County: DEREK C. WEIMER, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

## INTRODUCTION

Vencil Leo Ash III was charged with first degree murder in the death of Ryan Guitron. Ash was found guilty following a jury trial and was sentenced to life imprisonment. We reverse Ash's conviction and sentence and remand the cause for a new trial.

## FACTUAL BACKGROUND

On November 4, 2003, Guitron was reported missing by his girlfriend. Guitron's remains were discovered nearly 7 years later, on April 8, 2010, on an abandoned farm in rural Kimball County, Nebraska. The cause of death was determined to be two gunshot wounds, one through the right eye and the other through the back of the neck. The shots were later determined

to be fired from a Hi-Point .380-caliber pistol purchased by Ash's sister. Guitron's death was later found to have occurred on October 15, 2003.

In August 2003, Guitron had been living in a trailer home in Fort Collins, Colorado, with Ash and Kelly Meehan-Ash, Ash's then 15-year-old girlfriend (now his wife). Guitron, Ash, and Meehan-Ash were methamphetamine users. After living with Guitron for 3 to 4 weeks during August 2003, Ash and Meehan-Ash moved to a tent near Grover, in Weld County, Colorado. Ash testified that at this time, he retrieved the .380-caliber pistol from his sister because Meehan-Ash wanted some form of protection. The pistol was originally purchased on August 1, 2003, in Walsenburg, Colorado. Ash was with his sister during the purchase of this handgun.

#### MEEHAN-ASH'S VERSION OF EVENTS

At the time of trial, Ash and Meehan-Ash described two different versions of the events surrounding Guitron's death, each implicating the other as responsible for his murder. Meehan-Ash testified that Guitron had stolen a pair of her underwear and a bra and kept them with a pornographic magazine in a backpack and that after Ash found these items in Guitron's closet, he threatened to kill Guitron because of it. According to Meehan-Ash, on the day of the murder, Ash asked Guitron to travel with Ash and Meehan-Ash to get methamphetamine. Ash drove them in Guitron's car to the abandoned farm where Guitron's body was later discovered. The three of them had smoked methamphetamine during the car ride and again upon arriving at the abandoned farm.

According to Meehan-Ash, once parked, all three got out of the car and walked around the farm. They came upon parts of a baby bed, and Ash asked Meehan-Ash to collect the parts and take them back to the car. On her way back to the car, Meehan-Ash testified, she heard a gunshot. She turned in the direction of the two men and saw Ash standing over Guitron's body, holding the .380-caliber pistol. Meehan-Ash testified this was the first time she had seen the pistol that day because Ash normally tucked the gun in his pants. Meehan-Ash stated she did not hear or see a struggle or see any other weapon during the

incident. Ash then walked to the car to get some black gloves and told Meehan-Ash he was going to bury Guitron under a woodpile near the farm. After Ash covered up the body, they left to get gas and drove back to Fort Collins.

#### ASH'S VERSION OF EVENTS

Ash denied Meehan-Ash's story that Ash was aware Guitron had stolen Meehan-Ash's underwear and bra and that Ash wanted revenge. Ash testified that he and Guitron were actually good friends. Ash testified that on the day of the murder, the three of them went in Guitron's car to get iodine, an ingredient to make methamphetamine, from Guitron's iodine source so that Ash could "cook" more methamphetamine. Ash stated that he missed a turn and that they ended up at the abandoned farm where some old cars caught his eye. Ash also stated that he left his sister's .380-caliber pistol in a cooler that he put in the back seat next to Meehan-Ash. Ash testified, as did Meehan-Ash, that the three of them had smoked methamphetamine during the drive. He also agreed that they found a baby bed while at the farm. Ash testified that after finding the baby bed, Guitron went to the car and got a .22-caliber rifle and then Ash and Guitron continued to search the property without Meehan-Ash.

Ash testified that during their search, Guitron was going to smoke more methamphetamine, but discovered that there was no more methamphetamine left to smoke. Guitron then claimed that "he was going to kill that fucking bitch," referring to Meehan-Ash, and "took off running," rifle in hand. Ash went after Guitron, and he saw Guitron fire a shot from the .22-caliber rifle at Meehan-Ash. Ash then knocked the rifle out of Guitron's hand, which caused another round to go off. The two men struggled, and then Ash saw Meehan-Ash and heard a shot. The men fell to the ground, and Ash heard another shot. He then saw Guitron lying on the ground and Meehan-Ash in the car, banging her head against the dashboard. Ash testified, as did Meehan-Ash, that they then went to get gas. Ash testified that they returned, however, to pick up the rifle and retrieve from Guitron's person the address of Guitron's iodine source.

After the murder, Ash traded Guitron's car for a Cadillac Escalade. Meehan-Ash was with him during the trade. After trading for the Escalade, Ash and Meehan-Ash returned to Guitron's trailer home in Fort Collins and loaded Guitron's property into the Escalade. On October 13, 2003, 2 days before the murder, Ash had pawned Guitron's "Raiders Pro Line" leather jacket. Meehan-Ash claimed they had pawned the jacket to get money for food. Ash testified that he probably had pawned the jacket if his name was on the pawn ticket, but that he did not remember doing so. On October 17, 2 days after the murder, Ash pawned Guitron's television.

On October 18, 2003, Ash was arrested on a warrant for parole violations. The Escalade remained with Meehan-Ash after Ash's arrest. Meehan-Ash was arrested the next day on a juvenile warrant, and the .380-caliber pistol was discovered under Meehan-Ash's bed at Ash's sister's house where Meehan-Ash was living. The Escalade was towed on October 19. Several of Guitron's possessions were removed from the Escalade, including his credit card and various personal items identified at trial as belonging to Guitron. The parts of the baby bed gathered on the day of the murder were also removed from the Escalade. Law enforcement retrieved the .380-caliber pistol from Ash's sister on November 24. It was not disputed that this was the weapon used to shoot Guitron.

After Guitron's disappearance, Ash was questioned by law enforcement on several occasions. On November 4, 2003, Ash indicated that he had last seen Guitron on October 17 and that Guitron was supposed to pick him up to go work at an oil rig the next day, but Guitron never showed up. And on March 18, 2004, Ash was interviewed by the lead investigator into Guitron's disappearance. At that time, Ash told the investigator that he was broke at the time of his arrest because he had given Guitron large sums of money. Ash claimed that Guitron was still alive and that he last saw him on October 18, 2003, at Guitron's trailer home. Ash denied killing Guitron, but at the end of the interview, unsolicited, he asked whether they had found Guitron's body. Ash then stated that if Guitron was dead, law enforcement would have found his body because it had been quite some time since Guitron's disappearance.

On April 2, 2010, Meehan-Ash was interviewed by law enforcement on a different matter; however, she volunteered at the interview that Ash had killed Guitron. Meehan-Ash was then escorted by the lead investigator to try to locate the abandoned farm, but she failed to do so.

Following this interview, the lead investigator again interviewed Ash on April 7, 2010. At this interview, Ash initially denied shooting Guitron, but then admitted to shooting Guitron twice to protect Meehan-Ash because Guitron was shooting at her. Ash then directed law enforcement to the abandoned farm. Guitron's remains were later discovered there.

Officers also located two .22-caliber rifle casings at the abandoned farm. One casing was lying on top of the dirt, and the other on top of some cement; neither casing was rusted. Based on the locations of the two casings, law enforcement determined that the casings could not have been ejected to their respective locations from where Guitron had been shot, as shown by physical evidence that still remained at the scene, or from where his remains were located.

Later at trial, Ash testified that in order to protect Meehan-Ash, he initially did not tell law enforcement that Meehan-Ash shot Guitron. Ash further testified that Ash had promised Meehan-Ash's father that he, Ash, would take the blame for Guitron's murder. But according to Ash, while he was in jail, a puppy in his care died and that event made Ash want to tell the truth to law enforcement about who killed Guitron.

On November 1, 2011, the State filed an information charging Ash with the first degree murder of Guitron. Meehan-Ash was the first endorsed witness listed on the information. In a separate information, Meehan-Ash was charged with aiding and abetting the first degree murder of Guitron. The cases were consolidated for trial, and the trial was scheduled to begin June 25, 2012.

On June 15, 2012, Meehan-Ash agreed to submit to an off-the-record proffer with the State. Meehan-Ash later agreed to testify at trial consistent with that proffer. In exchange, the State agreed to reduce Meehan-Ash's charge of aiding and abetting the first degree murder of Guitron to accessory after

the fact. The State, Meehan-Ash, and Meehan-Ash's attorney signed this agreement. The discussion took place on June 20. On June 22, 3 days before trial was scheduled to begin, the State notified Ash's counsel that Meehan-Ash had struck a deal with the State, provided the State with an additional statement, and would now be testifying at trial.

On June 22, 2012, a telephone hearing was held at which Ash made an oral motion to continue trial. No bill of exceptions exists for this hearing, but the parties agree that the district court denied the motion. At oral argument before this court, counsel for Ash indicated that the district court judge stated during the telephonic conference that he would not be granting the motion at that time because it would be an obstacle to the court to inform the persons already summoned for jury service.

On June 25, 2012, prior to the commencement of trial, Ash filed a written motion, again requesting a continuance of the trial date, because counsel needed to complete additional pretrial discovery in light of Meehan-Ash's June 22 plea agreement. Defense counsel argued that his preparation, trial strategy, and theory had to be adjusted for a surprise witness. Counsel further argued that as there were hundreds of pages of correspondence between Ash and Meehan-Ash, more than 10 hours of recorded conversations, and several interviews of Meehan-Ash conducted by law enforcement, it would be "impracticable and unduly onerous" to undertake re-review for possible impeachment 3 days prior to trial. The State did not file a written response.

On June 25, 2012, when the parties appeared for the first day of trial, defense counsel orally renewed the motion to continue. The court initially denied the motion, but ordered that Meehan-Ash be produced for a deposition that evening. The jury was selected for trial that day, a Monday, but the actual trial did not commence. Arrangements were then made for Ash's counsel to take Meehan-Ash's deposition Monday evening before opening statements, and the presentation of the evidence began on Tuesday.

After Meehan-Ash's deposition was taken, defense counsel renewed his motion to continue. Defense counsel stated that

during her deposition, Meehan-Ash had reported for the first time that she was using methamphetamine before arriving at the farm and while she was there. In addition, she reported for the first time that during the period when the murder occurred, she had experienced visual and tactile hallucinations caused by her continual use of methamphetamine. Counsel stated that Meehan-Ash's statements were strong evidence that she was suffering from a drug-induced psychosis and that counsel needed time to find an expert who could explain the significance of her statements and drug use: i.e., that a person in a drug-induced psychosis can commit violent acts without knowing it.

The State was present at Meehan-Ash's deposition and responded to defense counsel's renewed motion on the record. The State argued that there had been no representation whatsoever that on the day of the murder, Meehan-Ash was experiencing hallucinations or that her memory about the murder was affected by methamphetamine. The State further argued that defense counsel had been aware through the pretrial preparation that Meehan-Ash was using methamphetamine. It argued that Meehan-Ash's use of methamphetamine on the day of the murder was not a surprise to Ash's counsel, because Ash, in his own statement, had told investigators that one reason for the crime was the use of methamphetamine by Guitron, Ash, and Meehan-Ash. Ash's renewed motion to continue was denied.

The motion was again renewed after the State's direct examination of Meehan-Ash. Defense counsel renewed his past arguments on the matter and further argued that he needed time to take the deposition of Aquilla Rios, an out-of-state witness, for impeachment purposes. The State did not respond to the motion, and it was denied. The record shows that on cross-examination, Meehan-Ash stated that in 2009, she told Rios about the murder, which was the first time she had told anyone about it. She told Rios that Guitron had repeatedly molested and raped her while she was living in his trailer home, but she stated that she could not remember whether she had told Rios about Ash's finding her underwear and bra in Guitron's backpack.

Also at the time of trial, Ash's counsel objected to the State's offer and the district court's admittance of a receipt signed by Ash showing that 2 days before the murder, Ash pawned a leather jacket belonging to Guitron. Ash's counsel argued the admission of this evidence violated Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), and moreover, there had been no hearing on the admissibility of this evidence. The State argued that this evidence was relevant as to intent and premeditation and that the alleged "bad act" of pawning Guitron's jacket was so intertwined with the underlying murder that under Nebraska's evidence laws, the receipt was admissible. The motion was ultimately denied.

Ash was convicted. He appeals.

### ASSIGNMENTS OF ERROR

Ash assigns that the district court erred in (1) denying his motion to continue trial and (2) admitting into evidence the pawn receipt for an improper purpose and without a prior hearing on admissibility.

### STANDARD OF REVIEW

[1,2] A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.<sup>1</sup> A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.<sup>2</sup>

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.<sup>3</sup> It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403

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<sup>1</sup> *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

<sup>2</sup> *Id.*

<sup>3</sup> *State v. Fremont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

(Reissue 2008), and § 27-404(2), and the trial court's decision will not be reversed absent an abuse of discretion.<sup>4</sup>

## ANALYSIS

### MOTION TO CONTINUE TRIAL

Ash first assigns that the district court abused its discretion by denying his motion to continue trial based upon Meehan-Ash's plea agreement to testify, because her deal was struck upon the eve of trial.

The basis of Ash's argument on appeal is that his counsel should not have to conduct a "night-time"<sup>5</sup> investigation to prepare for Meehan-Ash's testimony. In arguing to the district court on the motion to continue, Ash contended that he needed additional time to investigate Meehan-Ash's allegations that she experienced hallucinations while using methamphetamine, as she had been doing the day of the murder. Ash also contended that he needed additional time to interview a new witness, a former coworker of Meehan-Ash, because that coworker might have information regarding Meehan-Ash's allegations that she was coerced by Ash. We agree.

[5,6] A criminal defendant has constitutional and statutory rights which mandate the timely disclosure of the State's evidence in a criminal case. *Brady v. Maryland*<sup>6</sup> and *Kyles v. Whitley*<sup>7</sup> impose the constitutional mandate to disclose exculpatory evidence. Neb. Rev. Stat. § 29-1912(2) (Cum. Supp. 2012) further requires the State, upon request, to disclose evidence that is material to the preparation of a defense:

[W]hether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses,

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<sup>4</sup> *Id.*

<sup>5</sup> Brief for appellant at 10.

<sup>6</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

<sup>7</sup> *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

corroborating testimony, or assisting impeachment or rebuttal.<sup>8</sup>

In *State v. Kula*,<sup>9</sup> the State failed to turn over certain reports generated during the course of the police investigation until the first day of trial. We found the reports to be material and held that the trial court abused its discretion in failing to grant a continuance until the defendant could adequately investigate the reports and prepare a defense:

Because the State did not produce the material reports until the first day of trial, [the defendant] was unable to outline certain witnesses' testimony in his opening statements. Furthermore, [the defendant's] counsel should not have been forced into investigating the content of the reports by night while defending against a murder charge by day. In effect, [the defendant's] counsel was put in the position of trying this case on the run.<sup>10</sup>

We find *Kula* instructive. It is true that the State endorsed Meehan-Ash as a witness and that Ash knew Meehan-Ash used methamphetamine. But until she reached a plea agreement with the State, she would not have testified to facts that implicated her in first degree murder. She specifically admitted during cross-examination that she would not have testified against Ash if the State had not made a plea agreement with her that removed the possibility of a sentence of life imprisonment without parole. Thus, investigating Meehan-Ash's credibility was not a defense issue until she reached an agreement to testify in exchange for a reduced charge.

Moreover, in overruling Ash's motion for a continuance, the court did not find that his attorney's description of Meehan-Ash's statements in her deposition was inaccurate or false. The new information about Meehan-Ash's hallucinations was obviously material to preparing a defense because it directly

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<sup>8</sup> *State v. Kula*, 252 Neb. 471, 486, 562 N.W.2d 717, 727 (1997). Accord, *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

<sup>9</sup> *State v. Kula*, *supra* note 8.

<sup>10</sup> *Id.* at 487, 562 N.W.2d at 727.

affected her credibility. Similarly, investigating Meehan-Ash's statements to Rios might have undermined Meehan-Ash's credibility about Ash's motive for the murder—finding her underwear and bra in Guitron's backpack. Finally, investigating Meehan-Ash's statements to a coworker might have impeached her statements at trial that she feared Ash and that he had coerced her silence. And while defense counsel could have taken steps to find an expert or investigate impeachment information earlier, the need to take these steps did not arise until the State reached a plea agreement for her testimony literally on the eve of trial.

Although defense counsel cross-examined Meehan-Ash on her relationship with Ash and her claim that he had coerced her, without an opportunity to investigate, Ash could not discover whether she had made inconsistent statements to a third party that would have impeached her testimony. The fact that Ash's trial counsel took reasonable steps under the circumstances to address Meehan-Ash's testimony at trial does not remedy the prejudice of not having an opportunity to conduct an investigation.

Of course, not every "late" notice of an otherwise endorsed witness will require the granting of a continuance. But the State's endorsement of a codefendant as a witness is not fair notice that the codefendant will actually testify when the defendant's counsel reasonably believes that the codefendant will invoke his or her privilege against self-incrimination. We therefore hold that when the State reaches a plea agreement with a codefendant to testify on the brink of trial and that testimony is central to the State's prosecution of a criminal defendant, a trial court must, upon request, provide defense counsel with an adequate opportunity to investigate facts relevant to defending against the testimony. The failure to provide a continuance under such circumstances is prejudicial. We therefore conclude that the district court erred in denying Ash's motion for continuance.

[7] Having concluded that the denial of the motion to continue was reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Ash's conviction; if it was not, then

double jeopardy forbids a remand for a new trial.<sup>11</sup> But the Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.<sup>12</sup>

After reviewing the record, we conclude that the evidence presented at trial was sufficient to support the verdict against Ash. As such, we conclude that double jeopardy does not preclude a remand for a new trial, and we therefore reverse, and remand for a new trial.

#### PRIOR BAD ACTS EVIDENCE

Ash next assigns that the district court erred in admitting the pawn receipt showing that Ash pawned Guitron's jacket 2 days before Guitron's murder. Though we reverse, and remand as a result of the district court's failure to grant Ash's requested continuance, we address this assignment of error as it is likely to recur on retrial.<sup>13</sup>

On appeal, Ash contends that the pawn receipt was inadmissible as evidence of other bad acts, namely theft, under § 27-404(2). Ash further asserts that the State failed to show that the evidence was admissible for a proper purpose under § 27-404(2). And Ash argues that no hearing on the admissibility of this bad acts evidence was held as required by § 27-404(3).

Section 27-404 provides in relevant part:

(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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<sup>11</sup> See *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

(3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

Ash objected to the admission of the pawn receipt at trial on the basis of § 27-404(2). The district court overruled Ash's objection, finding that the evidence was inextricably intertwined with the crime charged because it formed the factual setting for the crime and, as such, did not fall under § 27-404(2).

[8] Indeed, Nebraska law provides that § 27-404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime:

This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.<sup>14</sup>

But we disagree that evidence of Ash's theft 2 days before the murder was inextricably intertwined with the charged crime.

As our inextricably intertwined rule implies, courts may generally admit evidence of a criminal defendant's uncharged bad act under this exception because exclusion would render the evidence of the charged crime confusing or incomplete.<sup>15</sup> It

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<sup>14</sup> *State v. Freemont*, *supra* note 3, 284 Neb. at 192, 817 N.W.2d at 290-91. Accord, *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011); *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). Cf. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

<sup>15</sup> See 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 404.20[2][b] (Joseph M. McLaughlin ed., 2d ed. 2011) (citing federal cases).

is the close entanglement of the evidence that creates the need to present evidence of facts that are inconsequential to proving the charged crime. In addition, federal courts hold that a defendant's other bad act is inextricably intertwined with the charged offense "when both acts are part of a single criminal episode, or when the other acts were necessary preliminaries to the crime charged."<sup>16</sup>

Most of our case law is consistent with these rules. It shows that we have upheld the admission of intrinsic evidence in the following circumstances: (1) The defendant's other bad acts showed his pattern of sexually abusing a child or exposing the child to sexually explicit material<sup>17</sup>; (2) the defendant destroyed evidence of the crime soon afterward<sup>18</sup>; (3) the defendant's arrest for a different theft resulted in the discovery of evidence of the charged theft, and the evidence established that the items were stolen<sup>19</sup>; and (4) the defendant was using a controlled substance at the time that the crime was committed.<sup>20</sup>

But none of these fact patterns are similar to this case. The theft of Guitron's jacket was not part of the factual setting for the murder, nor did it occur in the same immediate timeframe. So, it was not intrinsic because of its entanglement with the charged murder. Alternatively, it was not part of the same transaction as the murder, it was not a preliminary step in the murder, and it was not a consequential fact to establish the murder.

Instead, to the extent that the theft was admissible for a purpose other than to show Ash's bad character, it was relevant to show his motive: He committed the murder because he needed money. But the State's theory of Ash's motive was revenge. And even if we accepted Ash's need for money as a secondary motive—an issue that we do not decide—the State neither

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<sup>16</sup> *Id.* at 404-44.

<sup>17</sup> See, *State v. Baker*, *supra* note 14; *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

<sup>18</sup> See *State v. Robinson*, *supra* note 14.

<sup>19</sup> *State v. Wisinski*, *supra* note 14.

<sup>20</sup> See, *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002); *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

informed the court that it was offering the evidence to show Ash's motive nor proved its allegations in a hearing outside of the jury's presence. This case illustrates that applying the inextricably intertwined exception too broadly would eviscerate the procedural protections that apply to evidence presented under § 27-404(2).<sup>21</sup> We conclude that the court abused its discretion in admitting evidence of the theft under the inextricably intertwined exception.

### CONCLUSION

The judgment and sentence of the district court are reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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<sup>21</sup> See *State v. Freemont*, *supra* note 3.

HEAVICAN, C.J., concurring in part, and in part dissenting.

I concur with the majority's determination that the district court erred when it failed to grant Ash's motion to continue. I write separately because I disagree with the majority's determination that the admission of the pawn receipt violated Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012).

This court has often excluded certain evidence from the limitations set forth by rule 404(2)<sup>1</sup>:

“““[W]here evidence of other crimes is “so blended or connected, with the one[s] on trial [so] that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged,” it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic and therefore not governed by Rule 404 . . . . As such, prior conduct that forms the factual setting of the crime is not rendered inadmissible by rule 404. . . . The State

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<sup>1</sup> *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004); *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

is entitled to present a coherent picture of the facts of the crime charged, and evidence of prior conduct that forms an integral part of the crime charged is not rendered inadmissible under rule 404 merely because the acts are criminal in their own right, but have not been charged. . . . A court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime. . . .’”””<sup>2</sup>

More recently, in *State v. Freemont*,<sup>3</sup> this court began moving away from this exception in favor of a broader application of rule 404(2). In *Freemont*, a decision in which I did not participate, the defendant was charged with second degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. This court concluded that the testimony stating that several days before the murder at issue, the defendant, who was a felon, had been in the possession of a firearm was inadmissible under rule 404(2). The majority concluded that this evidence was not excepted from the rule under the “inextricably intertwined” exception, holding that “the prior misconduct did not provide any insight into [the defendant’s] reason for killing” the victim and “was not part of the same transaction and occurred several days or a week before” the murder.<sup>4</sup> This court also expressed concern that holding otherwise would “open the door to abuse” of the exception, noting that several federal courts have limited or rejected the exception.<sup>5</sup>

In a concurring opinion, Judge Cassel disagreed with the majority’s conclusion that the testimony in question was not substantive evidence of the charged crimes, noting the fact that the defendant had a gun shortly before the date of the underlying charges was “powerful circumstantial evidence that

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<sup>2</sup> *State v. Robinson*, *supra* note 1, 271 Neb. at 714, 715 N.W.2d at 549.

<sup>3</sup> *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

<sup>4</sup> *Id.* at 192, 817 N.W.2d at 291.

<sup>5</sup> *Id.*

he or she possessed it on the day of the charge. This evidence does not speak to the defendant's character; rather, it is evidence tending to prove that he or she possessed the gun on the date charged."<sup>6</sup>

The concurrence further notes that "the majority's approach would require a rule 404 analysis simply because the observations were not on the precise day of the charged crime."<sup>7</sup> The concurrence continues:

In the case before us, the evidence is not so removed in time as to lose its temporal connection to the charged date of possession. While I concede that such an interval exists, it is clear to me that a matter of a few days or a week is well within the relevant time.<sup>8</sup>

I am persuaded by the arguments set forth by the concurrence in *Freemont*, and I would not have joined the majority's opinion in that case. I find the arguments set forth by Judge Cassel in his concurrence to be applicable to the circumstances of this case. In my view, there is still a place for the inextricably intertwined exception.

I would find the evidence of the pawn receipt inextricably intertwined with the crime charged. Under our case law, where evidence of other crimes is "““““so blended or connected with the one[s] on trial . . . ’ . . . ,”””” that evidence ““““tends logically to prove any element of the crime charged.’ . . . ””””<sup>9</sup> In this case, that is just what the pawn receipt did.

The State's theory of the case was that Ash's motive was both to exact revenge for the sexual assault of Meehan-Ash and to rob Guitron. Evidence presented at trial showed that Ash and Meehan-Ash were in need of cash. Ash pawned Guitron's jacket, which was one of Guitron's prized possessions, just 2 days before the murder. The day after the murder, Ash exchanged Guitron's car for an Escalade and then retrieved his

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<sup>6</sup> *Id.* at 212, 817 N.W.2d at 303 (Cassel, Judge, concurring).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *State v. Robinson*, *supra* note 1, 271 Neb. at 714, 715 N.W.2d at 549.

and Meehan-Ash's possessions from Guitron's trailer. At that time, Ash helped himself to more of Guitron's possessions, pawning Guitron's television and apparently keeping the rest. When considered with this other evidence showing that Ash robbed Guitron, the pawn receipt tends to show Ash's intent and premeditation to commit first degree murder, an element necessary to the State's charge of first degree murder.

In addition to tending logically to prove any element of the crime charged,<sup>10</sup> so-called intrinsic or inextricably intertwined evidence is admissible despite rule 404(2) where it forms the factual setting of the crime.<sup>11</sup> And all the evidence does just that: forms the factual setting of the crime and presents to the jury the relevant and material actions of Ash and Meehan-Ash immediately before, during, and after the murder. This evidence showed that a few days before, the day of, and immediately after the murder, Ash and Meehan-Ash took items belonging to Guitron for material and financial gain. Such evidence was necessary for the State to present a coherent picture of the charged crime of premeditated murder. And because the pawning of the jacket occurred just days before the murder, in my view, the incident had not yet lost any temporal connection to Guitron's murder.

In its opinion, the majority notes this evidence would likely be admissible as independently relevant under rule 404(2) following a hearing under rule 404(3), and indeed provides a framework to the State and trial court to achieve just that end. But this framework is unnecessary because, in my view, rule 404(2) does not apply to prohibit the admission of this evidence.

For these reasons, I respectfully dissent from the majority's determination that the admission of the pawn receipt violated rule 404(2).

CASSEL, J., joins in this concurrence and dissent.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

WILLIAM WHITE AND DANA SINGSAAS AND REBECCA SINGSAAS,  
HUSBAND AND WIFE, APPELLANTS, V. MARVIN KOHOUT,  
IN HIS INDIVIDUAL CAPACITY, ET AL., APPELLEES.  
839 N.W.2d 252

Filed October 18, 2013. No. S-13-046.

1. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
2. **Judgments: Costs: Appeal and Error.** The standard of review for an award of costs is whether an abuse of discretion occurred.
3. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
4. **Actions: Pretrial Procedure: Attorney Fees: Costs.** A proposed order dismissing a case with qualifications or conditions does not constitute a "voluntary dismissal" within the meaning of Neb. Rev. Stat. § 25-824(5) (Reissue 2008).
5. **Actions: Attorney Fees: Costs.** The two requirements of Neb. Rev. Stat. § 25-824.01 (Reissue 2008), one mandating a court to specifically set forth the reasons for the award and the other requiring the court to consider enumerated factors, are separate and distinct.
6. **Statutes: Appeal and Error.** An appellate court gives statutory language its plain and ordinary meaning.
7. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court gives effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.
8. **Actions: Attorney Fees.** Attorney fees can be awarded when a party brings a frivolous action that is without rational argument based on law and evidence.
9. **Actions: Attorney Fees: Words and Phrases.** The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
10. **Actions: Attorney Fees.** Attorney fees for a bad faith action under Neb. Rev. Stat. § 25-824 (Reissue 2008) may be awarded when the action is filed for purposes of delay or harassment.
11. **Actions.** Relitigating the same issue between the same parties may amount to bad faith.
12. \_\_\_\_\_. Any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed in part, and in part reversed and remanded with direction.

Thomas R. Wilmoth, David A. Jarecke, and Vanessa A. Silke, of Blankenau, Wilmoth & Jarecke, L.L.P., for appellants.

Stephen D. Mossman and Patricia L. Vannoy, of Mattson, Ricketts, Davies, Steward & Calkins, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

### INTRODUCTION

Several taxpayers challenged the validity of an agreement for hosting of a nearby landfill. The district court dismissed their complaint and imposed attorney fees under “frivolous actions” statutes.<sup>1</sup> In the challengers’ appeal, we initially focus on the attorney fee award and reject two procedural arguments: First, their proposed dismissal included conditions disqualifying it as a “voluntary dismissal” under a statutory safe harbor. Second, the court sufficiently stated its reasons for the fee award. But because the court failed to resolve doubt over the merits of the complaint in the challengers’ favor, its fee award was an abuse of discretion. We reverse that portion of the court’s judgment. And because the reason for dismissal was relevant only to the fee issue, we affirm the dismissal of the complaint without deciding whether the court’s stated reason was correct.

### BACKGROUND

The challengers—William White, Dana Singaas, and Rebecca Singaas—are tax-paying residents of Seward County, Nebraska, who manage or own land in the vicinity of the Milford landfill, which is located near Milford in Seward County. G&P Development, Inc. (G&P), owns and operates the landfill.

At some point prior to May 2010, Seward County; Saline County, Nebraska; and several municipalities created the Seward/Saline County Solid Waste Management Agency

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<sup>1</sup> See Neb. Rev. Stat. §§ 25-824 and 25-824.01 (Reissue 2008).

(Agency). At oral argument, the challengers conceded that Agency is a separate legal entity.

On May 10, 2005, G&P and Agency entered into a host agreement providing for G&P to operate and maintain the Milford landfill. G&P and Agency executed an addendum to the host agreement on November 9, 2011, but the addendum did not change the terms at issue in this appeal.

G&P and Agency entered into the agreement expecting that it would become binding only upon the approval of an expansion of the Milford landfill onto adjacent land. Section 2.01 provided:

The obligations and liabilities of [G&P] under this Agreement shall be subject to the satisfaction by [G&P] of each of the conditions precedent set forth as follows:

. . . .

(b) All applicable and required environmental and governmental permits, licenses and authorizations that are (i) necessary for the existing and future expansion of the Landfill and Transfer Station/MRF, including but not limited to the current expansion onto property located adjacent to the Landfill, and (ii) required to be issued under applicable law, shall be obtained by [G&P], and all conditions contained in any such permit, license or authorization shall be acceptable to [G&P].

The host agreement also prohibited Agency from harming G&P's ability to obtain the necessary permits to site and develop waste facilities. Section 5.04 provided:

[G&P] may need the assistance of . . . Agency in local, state or federal environmental or land use permitting issues including specifically permits required from [Nebraska's Department of Environmental Quality], city or county zoning authorities to site, develop and operate its waste facilities. . . . *Agency shall make reasonable efforts to assist, and specifically agrees to not in any way hinder [G&P's] environmental or land use permitting processes described above.*

(Emphasis supplied.)

The challengers filed a declaratory judgment action against G&P, Agency, and Agency's past chairperson, Marvin Kohout

(collectively the landfill parties), as well as the counties of Seward and Saline, claiming that the agreement's terms "contravene the public policy of [Nebraska] by infringing on and impairing Defendant Seward County's duty to discharge its public functions with respect to zoning, land use, and related landfill siting requests." The challengers' complaint alleged that the agreement "mandates approval by Defendant Seward County of any and all requests for any zoning, land use or siting approval previously sought or to be sought by Defendant G&P."

The complaint also alleged that Seward County "granted each of G&P's requests for change of zone, conditional use permit, and siting approval for the expansion of the Milford Landfill" after the county received three letters communicating that approval was required under the terms of the host agreement.

The landfill parties and the two counties moved to dismiss the challengers' complaint "with evidence" and moved for attorney fees and costs pursuant to "§ 25-824 et seq." The district court conducted a hearing on July 9, 2012. At the hearing, counsel for the landfill parties formally stated on the record that the agreement did not require Seward County to approve land-use applications made by G&P. Counsel for the landfill parties further stated that Agency was an independent entity and could not contract to bind Seward County. At the conclusion of the hearing, the district court granted the challengers more time to submit additional evidence, "if [the challengers] think that's appropriate," and established a briefing schedule.

Prior to any ruling on the motions to dismiss, all of the parties filed motions for summary judgment. The district court conducted a hearing on November 20, 2012. Upon being informed that the motions to dismiss were still pending, the court overruled them and moved on to consider the motions for summary judgment. At the hearing, the challengers' counsel stated that they had accomplished their goal in filing the declaratory judgment action based upon the representations made by the landfill parties at the prior hearing. The challengers requested that the court memorialize the landfill

parties' admissions that the agreement did not bind Seward County through the court's granting summary judgment in the challengers' favor. The district court requested the challengers to "propose to [the court] some sort of language that would satisfy [the challengers'] needs" and took the motions under advisement.

The challengers then sent a letter, dated November 29, 2012, to the district court. The letter stated that upon further consideration, they believed the action was rendered moot by virtue of the landfill parties' admissions. The letter indicated that a proposed order acknowledging the action's mootness was enclosed. The letter further explained that it was vital to the challengers that the court's order set forth the grounds for the action's mootness.

The district court dismissed the challengers' complaint on December 14, 2012. The court found that the complaint failed to state a claim upon which relief could be granted and that there was no case or controversy at the time the challengers sought declaratory relief. The court further found that "[d]ue to the vexatious nature of the litigation, the [challengers'] [c]omplaint [was] frivolous and filed in bad faith." The court ordered the challengers to pay the landfill parties' and the counties' attorney fees and costs pursuant to §§ 25-824 and 25-824.01. The court allowed the landfill parties and the counties time to file affidavits in support of their attorney fees.

After G&P filed supporting affidavits, the challengers filed a response reminding the district court of their letter of November 29, 2012, which had enclosed a proposed order that, the challengers stated, "would have dismissed this case as moot." They asserted that the court should apply the safe harbor of § 25-824(5) relating to a "voluntary dismissal . . . within a reasonable time," thereby precluding an award of attorney fees and costs. The challengers' response did not assert any deficiency in the content of the court's order of December 14.

On January 9, 2013, the district court entered an order noting that only G&P had filed supporting affidavits and requiring the challengers to pay G&P's attorney fees and costs. The

challengers filed a timely notice of appeal. Pursuant to statutory authority, we moved the case to our docket.<sup>2</sup>

### ASSIGNMENTS OF ERROR

The challengers assign that the district court erred in ordering them to pay G&P's attorney fees and costs. They contend that § 25-824(5) barred the court from awarding attorney fees and costs, that § 25-824.01 required the court to make more specific findings, and that the court incorrectly found their complaint to be frivolous and filed in bad faith.

The challengers also assign that the district court erred in finding their complaint failed to state a claim upon which relief can be granted. Rather, they contend that the court should have found their claim was rendered moot during the course of the proceedings.

### STANDARD OF REVIEW

[1] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.<sup>3</sup>

[2] The standard of review for an award of costs is whether an abuse of discretion occurred.<sup>4</sup>

[3] An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.<sup>5</sup>

### ANALYSIS

Before turning to our review for an abuse of discretion of the district court's attorney fee allowance, we dispose of two preliminary arguments raised by the challengers. First, they assert that they voluntarily dismissed the action so as to fall

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<sup>2</sup> See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

<sup>3</sup> *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

<sup>4</sup> *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

<sup>5</sup> *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013).

within a statutory safe harbor. Second, they assert that the court failed to make specific findings for its award. We find no merit to either argument.

§ 25-824(5)

The challengers argue that the safe harbor of § 25-824(5) barred the district court from awarding G&P its attorney fees and costs. They assert that they qualify for the protection of § 25-824(5) because they voluntarily dismissed their claim. We agree that § 25-824(5) provides a safe harbor, but we disagree that the challengers accomplished a “voluntary dismissal.”

Section 25-824(5) provides, in pertinent part:

No attorney’s fees or costs shall be assessed . . . if, after filing suit, a *voluntary dismissal* is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that he or she would not prevail on such claim or action.

(Emphasis supplied.)

[4] The challengers rely upon their November 29, 2012, letter to the district court; but because the letter sought dismissal upon conditions, it did not qualify as a voluntary dismissal. The letter stated that it was vital to the challengers that the order dismissing the case would recognize the grounds on which the case had become moot. A proposed order dismissing a case with qualifications or conditions does not constitute a “voluntary dismissal” within the meaning of § 25-824(5). The challengers’ letter was a request for a ruling by the court that the case had become moot, not an attempt to voluntarily dismiss their claim. The letter, therefore, did not satisfy the safe harbor requirement.

The challengers do not assert that they took some other action that would constitute a voluntary dismissal. Thus, the record shows that the challengers never attempted to voluntarily dismiss their claim. Consequently, § 25-824(5) did not bar the district court from ordering the challengers to pay G&P’s attorney fees and costs.

§ 25-824.01

The challengers contend that § 25-824.01 required the district court to make more specific findings to support its award of attorney fees and costs. Section 25-824.01 requires a court to “specifically set forth the reasons for such award” of attorney fees and costs and to consider several factors in determining whether to assess attorney fees and costs and the amount to be assessed.

The district court’s December 14, 2012, order awarding attorney fees and costs complied with the requirement of § 25-824.01 for a court to specifically set forth its reasons for an award of attorney fees and costs. The court’s order found that “[d]ue to the vexatious nature of the litigation, the [challengers’] [c]omplaint [was] frivolous and filed in bad faith.” We have previously explained that the filing of frivolous or bad faith litigation provides adequate ground for the assessment of attorney fees.<sup>6</sup> Thus, the court complied with the statutory mandate to set forth the reasons for its award.

The challengers conflate the two separate directions of § 25-824.01. They reason that § 25-824.01 requires a court to make specific findings as to each factor set forth in the statute. The challengers rely on *Harrington v. Farmers Union Co-Op. Ins. Co.*<sup>7</sup> for the proposition that § 25-824.01 requires a court to make specific findings as to the factors delineated by the statute for a court to consider when determining whether to assess attorney fees and costs and the amount to be assessed. However, the challengers misconstrue the Court of Appeals’ holding in *Harrington*. The Court of Appeals made reference only to the factors listed in § 25-824.01.<sup>8</sup> It did not purport to hold that a court is required to make specific findings as to the factors.<sup>9</sup>

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<sup>6</sup> See *Chicago Lumber Co. of Omaha v. Selvera*, 282 Neb. 12, 809 N.W.2d 469 (2011).

<sup>7</sup> *Harrington v. Farmers Union Co-Op. Ins. Co.*, 13 Neb. App. 484, 696 N.W.2d 485 (2005).

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

[5-7] The statute's plain language defeats the challengers' argument. Section 25-824.01 first requires the court to specifically set forth its reasons for the award. The statute then directs the court to *consider* the delineated factors when determining whether to assess attorney fees and costs and the amount to be assessed.<sup>10</sup> We hold that the two requirements of § 25-824.01, one mandating a court to specifically set forth the reasons for the award and the other requiring the court to consider enumerated factors, are separate and distinct. The statute requires the court to specify the reasons for an award of attorney fees, but imposes no such requirement as to the factors.<sup>11</sup> In interpreting a statute, we give statutory language its plain and ordinary meaning.<sup>12</sup> And we give effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.<sup>13</sup> Because the plain language of § 25-824.01 requires a court only to set forth its reasons for an award and to consider the statutory factors, we decline to rewrite the statute to merge these separate requirements. We therefore conclude that the district court fully complied with § 25-824.01 in its order awarding attorney fees and costs. We now turn to the controlling question of whether the district court abused its discretion in imposing attorney fees under the circumstances of this case.

#### ATTORNEY FEES UNDER § 25-824

The challengers contend that the district court abused its discretion in awarding G&P its attorney fees and costs under §§ 25-824 and 25-824.01. Section 25-824(2) provides for the assessment of attorney fees and costs against a party who alleges a claim or defense that is frivolous or made in bad faith. The court awarded attorney fees and costs to G&P based upon its conclusion that the challengers' complaint was frivolous and filed in bad faith. We conclude that the court

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<sup>10</sup> See § 25-824.01.

<sup>11</sup> See *id.*

<sup>12</sup> *Rosberg v. Vap*, 284 Neb. 104, 815 N.W.2d 867 (2012).

<sup>13</sup> *Id.*

abused its discretion in awarding G&P its attorney fees and such costs as would have been recoverable only pursuant to § 25-824.

We first observe that the challengers do not contend the district court lacked the power to award ordinary taxable costs or abused its discretion in awarding to G&P those costs which are routinely granted as a matter of course.<sup>14</sup> The parties do not dispute that the challengers' complaint was properly subject to dismissal by the district court. Because the complaint sounded in equity, the court had the discretion to award G&P its ordinary, taxable costs, and in that respect, the court's order is not challenged. But the court's award of other costs (beyond those routinely granted as a matter of course) depends upon §§ 25-824 and 25-824.01.

[8-12] We therefore turn to the court's award of attorney fees and costs only pursuant to §§ 25-824 and 25-824.01. Although the law permits attorney fees to be assessed where an action is brought or defended by asserting a claim or defense that is frivolous or made in bad faith, we have emphasized that any doubt must be resolved against such an award. We have previously articulated the controlling standards. Attorney fees can be awarded when a party brings a frivolous action that is without rational argument based on law and evidence.<sup>15</sup> We have previously explained that the term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.<sup>16</sup> Attorney fees for a bad faith action under § 25-824 may also be awarded when the action is filed for purposes of delay or harassment.<sup>17</sup> We have also said that relitigating the same issue between the same parties may amount to bad faith.<sup>18</sup> Finally, any doubt whether a legal position is

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<sup>14</sup> See, Neb. Rev. Stat. §§ 25-1708 (Cum. Supp. 2012) and 25-1710 and 25-1711 (Reissue 2008); *Ehlers v. Campbell*, 159 Neb. 328, 66 N.W.2d 585 (1954); *Tobas v. Mutual Building and Loan Association*, 147 Neb. 676, 24 N.W.2d 870 (1946).

<sup>15</sup> *Chicago Lumber Co. of Omaha*, *supra* note 6.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* See, also, § 25-824(4).

<sup>18</sup> *Chicago Lumber Co. of Omaha*, *supra* note 6.

frivolous or taken in bad faith should be resolved for the party whose legal position is in question.<sup>19</sup>

The challengers' complaint relied upon two specific provisions of the host agreement and upon several letters to Seward County from G&P and Agency's past chairperson, Kohout, to support the challengers' claim that the host agreement constrained the county's regulatory authority. The first provision, section 2.01, specified conditions precedent to G&P's liability under the host agreement. The other provision, section 5.04, stated that Agency "shall make reasonable efforts to assist, and specifically agrees to not in any way hinder" G&P's environmental or land-use permitting processes. The challengers initially maintained that the language of section 5.04 constrained Seward County's regulatory authority. Although the challengers' argument was perhaps strained and farfetched, there was sufficient doubt to preclude an award of fees and costs under § 25-824.

The challengers' claim that the host agreement constrained Seward County's regulatory authority conflated Agency with the county of Seward. Agency is a separate public body corporate and politic of this state.<sup>20</sup> We have described such an entity as an interlocal agency akin to a quasi-municipal corporation.<sup>21</sup> We have also held that a municipality that was a member of an interlocal agency had no standing to sue upon the agency's behalf.<sup>22</sup> Thus, section 5.04, correctly understood, did not purport to delegate any of Seward County's regulatory authority to Agency.

Although section 5.04 failed to support the challengers' claim, the challengers nonetheless demonstrated a sufficient basis for their contention to create doubt as to whether their complaint was frivolous. The challengers' brief on appeal cites to § 13-804(6), which provides that a joint entity created by an interlocal agreement exercises public powers and acts on

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<sup>19</sup> *Id.*

<sup>20</sup> See Neb. Rev. Stat. § 13-804(6) (Reissue 2012).

<sup>21</sup> See *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

<sup>22</sup> See *id.*

behalf of the public agencies which are parties to the agreement. While the challengers may have employed a flawed analysis, they demonstrated sufficient rational argument to create doubt as to whether their complaint was frivolous.

We reiterate that any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.<sup>23</sup> Because the challengers demonstrated some rational basis for their claim, such doubt existed. The district court should have resolved this doubt in the challengers' favor.

Similar doubt existed as to whether the challengers' complaint was filed in bad faith. The only evidence in the record indicating that the challengers' complaint may have been filed in bad faith is a prior suit filed by the Singasaases and against G&P and Seward County. However, there was doubt as to whether the challengers' present suit was an attempt to relitigate the issues involved in the prior suit. The prior suit challenged Seward County's approval of the zoning change and siting application. The present suit challenged the effect and enforceability of the host agreement. Thus, had the two suits proceeded to trial, they would have likely called for the litigation of different issues. Because the two suits would have likely required the litigation of different issues, we find that doubt existed as to whether the challengers' complaint was filed in bad faith. The district court should have resolved this doubt in the challengers' favor.

Because the district court failed to resolve doubt in the challengers' favor, the court abused its discretion in awarding G&P attorney fees and costs under §§ 25-824 and 25-824.01. We therefore reverse the award of attorney fees and such costs as would have been recoverable only pursuant to § 25-824.

#### FAILURE TO STATE CLAIM

[13] The parties do not dispute that the challengers' action was properly subject to dismissal—they merely dispute whether the proper basis for dismissal was for failure to state a claim or for mootness. But this issue had significance only with

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<sup>23</sup> See *Chicago Lumber Co. of Omaha*, *supra* note 6.

regard to the award of attorney fees. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.<sup>24</sup> Because we have already reversed the award of attorney fees, we need not address the district court's finding in support of its award that the challengers' complaint failed to state a claim upon which relief could be granted.

### CONCLUSION

The challengers' submission of a proposed order for dismissal upon conditions did not qualify as a voluntary dismissal under § 25-824(5). The district court complied with the statutory mandate to state the reasons for its award of attorney fees and costs under § 25-824.01. The parties do not dispute the court's award of costs routinely granted as a matter of course, and the court did not abuse its discretion in taxing such costs to the challengers. However, the court failed to resolve doubts in the challengers' favor and, therefore, abused its discretion in awarding attorney fees and costs under §§ 25-824 and 25-824.01. We therefore reverse the portion of the judgment awarding such attorney fees and costs. Because the court did not focus on the distinction between costs routinely granted as a matter of course and those allowable only pursuant to § 25-824, we remand the cause with direction to tax costs in accordance with § 25-1711. The reversal of the attorney fee award makes it unnecessary to consider the basis for the court's dismissal of the challengers' complaint. Accordingly, we affirm the court's judgment dismissing the complaint.

AFFIRMED IN PART, AND IN PART REVERSED  
AND REMANDED WITH DIRECTION.

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<sup>24</sup> *Holdsworth v. Greenwood Farmers Co-op*, ante p. 49, 835 N.W.2d 30 (2013).

JESSICA FREEMAN, APPELLEE AND CROSS-APPELLANT,  
v. MICHAEL L. GROSKOPF, APPELLANT  
AND CROSS-APPELLEE.  
838 N.W.2d 300

Filed October 25, 2013. No. S-12-996.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, an appellate court will affirm the trial court's decision absent an abuse of discretion.
2. **Child Support: Appeal and Error.** Whether a child support order should be retroactive is entrusted to the discretion of the trial court, and an appellate court will affirm its decision absent an abuse of discretion.
3. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
5. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
6. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
7. **Child Support.** Use of earning capacity to calculate child support is useful when it appears that the parent is capable of earning more income than is presently being earned.
8. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, child support modifications should generally apply retroactively to the first day of the month following the complaint's filing.
9. **Child Support.** In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations.

Appeal from the District Court for Sarpy County: MAX  
KELCH, Judge. Affirmed.

Benjamin E. Maxell, of Adams & Sullivan, P.C., L.L.O., for appellant.

Christopher Perrone, of Perrone Law, and Ryan D. Caldwell, of Caldwell Law, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

Jessica Freeman filed a complaint to modify Michael L. Groskopf's child support, which the district court granted. Groskopf argues that the court erred in finding a material change in circumstances and in setting his earning capacity at \$15.23 per hour, 40 hours per week. On cross-appeal, Freeman argues that the court erred in not applying the modification retroactively and in not requiring Groskopf to also contribute toward childcare expenses.

## BACKGROUND

### PROCEDURAL HISTORY

This case began with Freeman's April 2009 complaint against Groskopf to establish paternity, custody, and support of her child. Based on genetic testing, the court found that Groskopf was the child's father. The court then awarded sole custody to Freeman (subject to a parenting plan) and ordered Groskopf to pay \$1,062.48 in monthly child support. The decree also addressed other issues, such as the child's health insurance and childcare expenses.

Groskopf filed a "Motion to Set Aside Default Judgment, File Answer Out of Time, and Modify Temporary Order," which the court treated as a request to modify child support. The record shows that Groskopf wanted to lower his child support because, among other reasons, he had entered automotive school full time and had no income. In its order, the court concluded that there had been a material change in circumstances, but that the child still required support. So the court calculated a lower child support amount based on Groskopf's earning capacity, which the court found to be \$7.25 per hour, 40 hours per week. This resulted in an obligation of \$256 per month.

The court did not require Groskopf to pay health care or child-care expenses because it would have brought him below the basic subsistence limitation.<sup>1</sup>

In February 2012, Freeman filed a complaint to modify Groskopf's child support obligation. She alleged that there had been a material change in circumstances warranting an increase in child support. She also requested that the court order Groskopf to contribute toward the child's health care and childcare costs. The trial occurred in September and covered not only the request for modification but also whether Groskopf was in contempt for not complying with earlier court orders. There are no issues on appeal related to the contempt proceedings.

#### TRIAL

Freeman, Groskopf, and Groskopf's father all testified at trial. Regarding the modification issue, Freeman generally testified that she believed Groskopf could pay more child support because he had graduated from automotive school and was able to work. For the same reasons, she testified that she thought she deserved help in paying the child's health care and childcare expenses. She then outlined her own current income, expenses, and job situation, and requested that the court make any order retroactive to the date she filed her complaint.

Groskopf testified that he had graduated from automotive school in December 2010 but could not find a job in that field. He testified that he took a summer seasonal job in 2010, paying \$8.50 per hour, and then began volunteering at a police department until the spring of 2011 because he became interested in a career in law enforcement. He eventually gave up on that career path and found a full-time job with Butler Machinery Company (Butler Machine) in June 2012 which paid \$15.23 per hour. After a few months, however, Groskopf entered a 2-year internship, sponsored by Butler Machine, in which he would alternate every 2 months between full-time schooling (diesel technology) and full-time paid work. As for his living

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<sup>1</sup> See Neb. Ct. R. § 4-218 (rev. 2012).

expenses, and his current child support, he testified that his father paid for everything. His father confirmed this during his testimony.

#### COURT ORDER

The court increased Groskopf's child support based on an earning capacity of \$15.23 per hour, 40 hours per week. The court generally found that there had been a material change in circumstances—Groskopf's graduation and earlier full-time employment at Butler Machine—and that Groskopf had acted in bad faith in failing to provide for his child. The court noted, "Any person who seeks further education to improve his/her circumstances would normally be viewed in a positive manner, but at some point, those decisions must be balanced against the best interest of the minor child."

The court reasoned further:

In determining the equities in this case, this Court notes that [Groskopf] had gained full-time employment, earning \$15.23 per hour, but voluntarily chose to reduce those earnings, which was not in the best interest of his child . . . ; that [he] made this same argument in 2010 to justify reducing his child support; that [he] continually changes his career field by returning to school and not fully supporting his child; that but for [his] father paying the child support, [he] has made no efforts, himself, to financially support his child; and that [he] never addressed how his minor child would be financially supported or expressed any concern about that issue. The facts of this case appear to be a situation where [Groskopf's] change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets, and not made in good faith.

Based on the \$15.23-per-hour figure, the court increased Groskopf's child support to \$577 per month and also required him to contribute toward the child's health care expenses. The court did not address the child's childcare expenses. But despite finding that Groskopf had acted in bad faith, the court declined to make the modification retroactive:

[A]lthough this Court has found that [Groskopf's] actions were not made in good faith, the reality is that any retroactive application of the increased child support would only result in an immediate arrearage. This Court finds that good cause is shown, in that, [Groskopf] should use this opinion as an incentive to gain full time employment, and financially support his minor child, as required by the laws of Nebraska.

### ASSIGNMENTS OF ERROR

Groskopf assigns, restated and consolidated, that the court erred in finding (1) a material change in circumstances, and thereafter modifying his child support, because Groskopf remained enrolled in school full time and had no actual income and (2) his earning capacity to be \$15.23 per hour, 40 hours per week.

On cross-appeal, Freeman assigns, restated, that the court erred in (1) not applying the modification retroactively and (2) not requiring Groskopf to contribute toward the child's child-care expenses.

### STANDARD OF REVIEW

[1,2] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, we will affirm the trial court's decision absent an abuse of discretion.<sup>2</sup> Whether a child support order should be retroactive is also entrusted to the discretion of the trial court, and we will affirm its decision absent an abuse of discretion.<sup>3</sup>

[3] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed

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<sup>2</sup> See *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

<sup>3</sup> See, e.g., *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

the witnesses and accepted one version of the facts rather than another.<sup>4</sup>

## ANALYSIS

### MATERIAL CHANGE IN CIRCUMSTANCES

Groskopf argues that the district court erred in finding a material change in circumstances. Specifically, Groskopf argues that because his “schooling and employment status had not changed . . . it is inconceivable that a material change in circumstances could have occurred.”<sup>5</sup> Groskopf also argues, based on *Collins v. Collins*,<sup>6</sup> that any change in circumstances was only temporary and did not exist at the time of trial. As such, Groskopf argues that there was no material change in circumstances and therefore no basis to modify his child support obligation.

[4] “A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.”<sup>7</sup> The Nebraska Child Support Guidelines establish a rebuttable presumption of a material change in circumstances when application of the guidelines “would result in a variation by 10 percent or more, but not less than \$25, upward or downward, of the current child support obligation . . . due to financial circumstances which have lasted 3 months and can reasonably be expected to last an additional 6 months.”<sup>8</sup>

Applying the guidelines here, the district court increased Groskopf’s child support obligation from \$256 per month to \$577 per month, which is “a variation by 10 percent or more, but not less than \$25, upward.” And that increase was “due to financial circumstances which [had] lasted 3 months and [could] reasonably be expected to last an additional

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<sup>4</sup> See *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999).

<sup>5</sup> Brief for appellant at 11.

<sup>6</sup> *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012).

<sup>7</sup> *Incontro v. Jacobs*, 277 Neb. 275, 281, 761 N.W.2d 551, 557 (2009).

<sup>8</sup> Neb. Ct. R. § 4-217.

6 months”; namely, Groskopf’s increased earning capacity, which, as will be seen below, the court appropriately set and used. As such, there was a rebuttable presumption that there had been a material change in circumstances warranting modification.

[5] Groskopf has not rebutted that presumption.

Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.<sup>9</sup>

Here, the record shows that Groskopf’s financial position had changed from the court’s previous order, in that he had graduated from automotive school (his attendance there was a primary reason for the earlier downward modification) and that he had obtained full-time employment with Butler Machine working for \$15.23 per hour. Granted, Groskopf had then entered another program alternating every 2 months between full-time school and full-time paid work, but his graduation and job at Butler Machine were evidence of his earning capacity, which was much higher than the minimum wage used to calculate his prior child support obligation. And this change—his increased earning capacity—was not temporary, because he had earned his degree and demonstrated his ability to work for that \$15.23-per-hour wage. The district court also found that Groskopf’s actions were in bad faith because Groskopf continually changed his career and education paths without thought as to the needs of his child. Under these circumstances, we conclude that a material change in circumstances had occurred and that the court did not err in modifying Groskopf’s child support obligation.

Groskopf’s reliance on *Collins* to argue otherwise is misplaced. In *Collins*, and as relevant to this issue, the Nebraska Court of Appeals held that “the change in circumstances

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<sup>9</sup> *Incontro*, *supra* note 7, 277 Neb. at 282-83, 761 N.W.2d at 558. See, also, *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000).

justifying a modification of child support must exist at the time of trial.”<sup>10</sup> The Court of Appeals reasoned that the change must exist at the time of trial “because the court’s decision to modify child support must be based upon the evidence presented in support of the complaint to modify” and “because the change in circumstances cannot be temporary.”<sup>11</sup> We agree with the Court of Appeals, but that does not help Groskopf. Here, the change in circumstances was Groskopf’s increased earning capacity (along with his acting in bad faith), which existed at the time of trial and which was not temporary. This assigned error has no merit.

#### EARNING CAPACITY

Next, Groskopf argues that the court erred in finding his earning capacity to be \$15.23 per hour, 40 hours per week. Specifically, Groskopf argues that that figure is inappropriate and excessive because he is enrolled full time in school and does not have a regular source of income and because he no longer has his job at Butler Machine, which job was the basis for the \$15.23-per-hour figure.

[6,7] In general, child support payments should be set according to the Nebraska Child Support Guidelines.<sup>12</sup> The guidelines provide that “[i]f applicable, earning capacity may be considered in lieu of a parent’s actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources.”<sup>13</sup> Use of earning capacity to calculate child support is useful “when it appears that the parent is capable of earning more income than is presently being earned.”<sup>14</sup>

Groskopf takes issue with the \$15.23-per-hour figure, which was Groskopf’s rate of pay while working full time at Butler

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<sup>10</sup> *Collins*, *supra* note 6, 19 Neb. App. at 535, 808 N.W.2d at 911.

<sup>11</sup> *Id.*

<sup>12</sup> See *Incontro*, *supra* note 7.

<sup>13</sup> Neb. Ct. R. § 4-204. See, also, *Incontro*, *supra* note 7.

<sup>14</sup> *Rauch*, *supra* note 4, 256 Neb. at 264, 590 N.W.2d at 175.

Machine. We disagree with Groskopf's contention that that figure is inappropriate or excessive because he is now currently without a steady stream of income. Earning capacity looks at what the obligated parent is capable of earning, rather than at his or her current income<sup>15</sup> and, indeed, is used "in lieu of . . . actual, present income."<sup>16</sup>

Nor are we persuaded that the \$15.23-per-hour figure is inappropriate or excessive because Groskopf is enrolled full time in school and no longer works at Butler Machine. The record shows that Groskopf voluntarily left Butler Machine for additional schooling and that had he not done so, he could have continued working there. It thus appears that Groskopf left Butler Machine "due to his own personal wishes, and not as a result of unfavorable or adverse conditions in the economy, his health, or other circumstances that would affect [his] earning capacity."<sup>17</sup> In other words, Groskopf is capable of earning \$15.23 per hour, 40 hours per week, but he chooses not to. Based on our *de novo* review of the record, we conclude that the \$15.23-per-hour figure was neither inappropriate nor excessive, but was instead supported by the record and properly used to calculate Groskopf's child support obligation.

#### RETROACTIVE MODIFICATION

On cross-appeal, Freeman argues that the district court erred in failing to make the modification retroactive. Freeman emphasizes that the court found that Groskopf acted in bad faith, that Groskopf failed to show an inability to pay the arrearage if the order were made retroactive, and that Freeman has been working full time (with an additional seasonal job) while also going to school full time. In short, Freeman argues that the equities of this case require applying the modification retroactively and that the court abused its discretion in not doing so.

[8,9] We have stated that absent equities to the contrary, child support modifications should generally apply retroactively to

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<sup>15</sup> See *id.*

<sup>16</sup> § 4-204.

<sup>17</sup> See *Incontro*, *supra* note 7, 277 Neb. at 285, 761 N.W.2d at 559-60.

the first day of the month following the complaint's filing.<sup>18</sup> We have also stated that in determining whether to apply a modification retroactively, the ability to pay is an important factor.<sup>19</sup> And in *Wilkins v. Wilkins*,<sup>20</sup> we cited with approval *Cooper v. Cooper*,<sup>21</sup> in which the Court of Appeals stated that "in the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations."<sup>22</sup>

Here, the district court explicitly found that Groskopf had acted in bad faith and, from our reading of the order, implicitly found that Groskopf did not have the ability to pay any retroactive arrearage while maintaining his current obligations. The court's findings in that respect bear repeating:

[A]lthough this Court has found that [Groskopf's] actions were not made in good faith, the reality is that any retroactive application of the increased child support would only result in an immediate arrearage. This Court finds that good cause is shown, in that, [Groskopf] should use this opinion as an incentive to gain full time employment, and financially support his minor child, as required by the laws of Nebraska.

As noted at oral argument, although we have concluded that in the absence of bad faith, it is an abuse of discretion to retroactively apply the modification when the obligated parent does not have the ability to pay, we have never held the converse. In other words, we have never held that where there is bad faith and an inability to pay, the trial court *must* make the modification retroactive. And we decline to do so here; instead, in such circumstances, the decision still remains within the court's discretion.

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<sup>18</sup> See, e.g., *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

<sup>19</sup> See *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999).

<sup>22</sup> *Id.* at 538, 598 N.W.2d at 478.

Based on the record, we cannot say the trial court abused its discretion in failing to make the modification retroactive. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.<sup>23</sup> Those factors are not present here. There is some evidence to support the court's conclusion that Groskopf would be unable to pay the retroactive support while maintaining his current obligations. Notably, too, the primary basis for determining Groskopf's earning capacity—his job at Butler Machine—did not come into being until June 2012. Thus, it would seem odd to apply the modification retroactively to March 2012 (the month after the complaint's filing),<sup>24</sup> when the primary basis for determining the new child support obligation did not exist at that time. We find no abuse of discretion on this issue.

#### CHILDCARE EXPENSES

Also on cross-appeal, Freeman argues that the district court erred in failing to order Groskopf to contribute toward childcare expenses. Freeman argues that the child support guidelines require Groskopf to contribute toward childcare expenses when, as here, the expenses are incurred due to a parent's employment or to allow a parent to pursue necessary training or education.<sup>25</sup> And Freeman argues that because Groskopf's child support obligation is now based on his higher earning capacity, assessing childcare expenses against him would no longer bring him below the basic subsistence limitation.<sup>26</sup>

Although we generally agree with the premise of Freeman's argument, the record shows only that Freeman has incurred some childcare expenses, but not their actual cost. The child

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<sup>23</sup> See *Gase*, *supra* note 2.

<sup>24</sup> See, e.g., *Peter*, *supra* note 18.

<sup>25</sup> See Neb. Ct. R. § 4-214.

<sup>26</sup> See § 4-218.

support guidelines provide a court with some discretion as to the amount it orders an obligor to contribute toward childcare expenses.<sup>27</sup> Without knowing the actual cost of the childcare, it is nearly impossible for a court to exercise that discretion in an appropriate manner. The burden of proof is on the party seeking modification.<sup>28</sup> Because Freeman did not provide evidence of the actual cost of childcare, she failed to meet that burden. We therefore find no error in the district court's failure to order Groskopf to contribute toward childcare expenses.

### CONCLUSION

We affirm the district court's order in all respects. We agree that there was a material change in circumstances, that using earning capacity was appropriate, and that the earning capacity was set at an appropriate level. We also find no abuse of discretion in the court's refusal to make the modification retroactive. And because Freeman failed to adduce evidence of the actual cost of childcare expenses, we find no error in the district court's failure to order Groskopf to contribute toward childcare expenses.

AFFIRMED.

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<sup>27</sup> See § 4-214.

<sup>28</sup> See, *Peter*, *supra* note 18; *Gartner v. Hume*, 12 Neb. App. 741, 686 N.W.2d 58 (2004).

CASSEL, J., concurring.

Although I agree with the result reached by the majority, I write separately because I do not find the facts of this case to be so readily distinguishable from the facts in *Collins v. Collins*.<sup>1</sup> The majority concludes that there was a material change in circumstances because Groskopf demonstrated his ability to work for a higher wage, and I agree with this conclusion. However, I similarly believe that the respondent in *Collins* demonstrated her ability to work for, at a minimum, the minimum-wage rate. I therefore am not convinced that the Nebraska Court of Appeals was correct in concluding that

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<sup>1</sup> *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012).

there was no material change in circumstances in that case. Nonetheless, because I agree with the majority's conclusion in the case before us, I concur.

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STATE OF NEBRASKA, APPELLEE, V.  
JOSHUA D. LEIBEL, APPELLANT.  
838 N.W.2d 286

Filed October 25, 2013. No. S-12-1047.

1. **Appeal and Error.** An appellate court resolves questions of law and issues of statutory interpretation independently of the lower court's conclusion.
2. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.
3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
4. **Judgments: Presumptions: Appeal and Error.** A judgment of the district court brought to an appellate court for review is supported by a presumption of correctness.
5. **Judgments: Appeal and Error.** An appellant challenging a judgment of the district court brought to an appellate court for review must both assign and specifically argue any alleged error.
6. **Constitutional Law: Trial: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there has been a prior opportunity for cross-examination.
7. **Public Officers and Employees: Motor Vehicles: Records: Intent.** Although the employees who create driving records may reasonably believe the records will be available for some possible future prosecution, the sole purpose of creating driving records is not to create evidence for trials.
8. **Records: Witnesses.** Because neutral, bureaucratic information from routinely maintained public records is not obtained by use of specialized methodology, there is little, if any, practical benefit to applying the crucible of cross-examination against those who maintain the information.
9. **Constitutional Law: Trial: Witnesses: Appeal and Error.** The improper admission of statements in violation of the right to confrontation is a trial error subject to harmless error review.
10. **Constitutional Law: Trial: Proof: Appeal and Error.** Where the trial error is of a constitutional dimension, the burden must be on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained.

11. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Ariel Johnson, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LEMAN, and CASSEL, JJ.

McCORMACK, J.

#### NATURE OF CASE

The sentencing order for the defendant's prior conviction of driving under the influence allowed him to drive with an ignition interlock permit and device. The defendant failed to obtain an ignition interlock permit or device, however, before driving. He was convicted of the felony offense of driving with a revoked license in violation of Neb. Rev. Stat. § 60-6,197.06(1) (Reissue 2010). The defendant argues that in *State v. Hernandez*,<sup>1</sup> we held that § 60-6,197.06(1) is ambiguous and that ignition interlock device violations fall under a different misdemeanor statute specific to such violations. The defendant also asserts that his Department of Motor Vehicles (DMV) record and accompanying documents, as well as statements certifying their authenticity, were inadmissible hearsay and violated his right to confrontation. Finally, he asserts that his sentence was excessive. We affirm.

#### BACKGROUND

Joshua D. Leibel was charged under § 60-6,197.06 with operating a motor vehicle while his operator's license had been revoked, a Class IV felony. Leibel had previously been

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<sup>1</sup> *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

sentenced to 5 years of license revocation for a conviction of driving under the influence, third offense. The sentencing order specified that Leibel would be permitted to drive after he obtained an ignition interlock permit and equipped his vehicle with an ignition interlock device.

At the bench trial for the charge of driving with a revoked license, the State presented the testimony of a Lincoln police officer. The officer testified that on October 3, 2011, he pulled Leibel's vehicle over after observing expired tags on the license plates of the vehicle. The officer testified that during the stop, Leibel told him that his driver's license was suspended. The officer did not observe an ignition interlock device on the vehicle Leibel was driving.

The State also offered into evidence two exhibits. Exhibit 2 contained a certified copy of the 2011 sentencing order and other documents relating to the 2011 conviction. Exhibit 2 was admitted without objection.

Exhibit 1 contained the administrative order of revocation of Leibel's driver's license by the DMV and related DMV documents, as well as the "Complete Abstract of Record" for Leibel with the DMV. There was no indication in the complete DMV record that Leibel had been issued an ignition interlock permit before October 3, 2011. The abstract instead reflects that Leibel was issued an ignition interlock permit on October 4.

Each page of the abstract and accompanying DMV documents contains either the seal of the DMV or a file stamp. The abstract contains an apparent photocopy of a signed certification by a custodian of the records division, Betty Johnson, attesting it is a true and correct abstract of the operating record. This certification page also contains the raised seal of the DMV.

The DMV abstract and accompanying documents were prefaced by a letter written by the DMV program manager, Kathy Hraban, certifying that the copies of the DMV record were true and exact copies of the originals on file at the DMV. In the letter, Hraban also states that on October 3, 2011, Leibel's driving privileges had not been reinstated and Leibel did not have an ignition interlock permit.

Defense counsel objected to the entirety of exhibit 1 on foundation, relevance, hearsay, and Confrontation Clause grounds. The district court overruled Leibel's objections and received the exhibit.

After the close of the State's case in chief, defense counsel moved to dismiss the charges for failure to establish a *prima facie* case. Defense counsel presented no evidence in Leibel's defense and, after resting, renewed his motion to dismiss. Defense counsel argued that Leibel should have been charged with misdemeanor ignition interlock permit violations and not with the felony of driving with a revoked license.

The district court overruled Leibel's motion to dismiss. The court reasoned that Neb. Rev. Stat. § 60-6,211.05(5) (Reissue 2010) applied to persons who had obtained their ignition interlock permit as allowed by the sentencing order, while § 60-6,197.06 applied to persons who had failed to obtain their ignition interlock permit.

The district court found Leibel guilty of violating § 60-6,197.06(1). At the sentencing hearing, Leibel explained that he had been relying on his girlfriend to drive him around, but they broke up. He lives in a rural area and does not have access to public transportation. Leibel stated he had finally saved up the money to install an ignition interlock device and was going to apply for a permit. But before getting the permit, he was called into the probation office for a test. He made the decision to drive to his probation visit. After the probation visit, Leibel went to work, made a telephone call while at work to obtain the necessary car insurance, and went to get the ignition interlock device installed. According to Leibel, the person able to install the device was not available at that time and Leibel was directed to come back the next day. On his way home, Leibel was stopped by the police officer.

The court sentenced Leibel to 90 days' jail time and a 15-year license revocation. The court reasoned that it was inappropriate to simply place Leibel on probation when the offense was a probation violation. Leibel's presentence investigation report indicated multiple misdemeanor offenses and two prior convictions of driving with a suspended license, in addition to his prior convictions of driving under the influence. The court

stated it would allow Leibel the opportunity to drive with an ignition interlock device and permit as soon as he was eligible by statute; and the court deferred the 90-day jail sentence until Leibel could request a work release. Leibel appeals the conviction and sentence, which was deferred until the resolution of this appeal.

### ASSIGNMENTS OF ERROR

Leibel asserts that the district court erred in (1) admitting exhibit 1, (2) failing to apply the reasoning of *Hernandez*, (3) convicting him on insufficient evidence, and (4) imposing an excessive sentence.

### STANDARD OF REVIEW

[1] An appellate court resolves questions of law and issues of statutory interpretation independently of the lower court's conclusion.<sup>2</sup>

[2] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.<sup>3</sup>

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.<sup>4</sup>

### ANALYSIS

#### HEARSAY AND CONFRONTATION

Leibel first asserts that the court erred in admitting exhibit 1 over his hearsay and Confrontation Clause objections. He points out that without exhibit 1, there would be little evidence he violated either the felony statute under which he was convicted or the misdemeanor statute he believes he should have been charged with violating. Leibel's principal argument is that both the certificates of authenticity and the DMV records to which the certificates pertained were testimonial in nature;

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<sup>2</sup> *Fox v. Whitbeck*, 280 Neb. 75, 783 N.W.2d 774 (2010).

<sup>3</sup> *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

<sup>4</sup> *State v. McGuire*, ante p. 494, 837 N.W.2d 767 (2013).

therefore, their admission without the opportunity to cross-examine violated his right to confrontation. Leibel alternatively asserts that the State waived any argument on appeal that exhibit 1 was admissible hearsay under the rules of evidence. We address Leibel's rules of evidence argument first.

The parties agree that exhibit 1 contains hearsay. The general rule is that hearsay evidence is inadmissible unless it fits within a recognized exception to the rule against hearsay.<sup>5</sup> But besides a bare assertion that exhibit 1 was inadmissible, Leibel fails to present any argument that the district court was incorrect in its implicit determination that the statements therein fit within a recognized exception to the rule against hearsay. Instead, Leibel argues that because the State failed to articulate at trial the specific hearsay exception under which it claimed admissibility of the exhibit, the State waived for purposes of this appeal any argument that exhibit 1 was admissible.

[4,5] Leibel misunderstands the respective responsibilities of the parties on appellate review. A judgment of the district court brought to our court for review is supported by a presumption of correctness.<sup>6</sup> An appellant challenging that judgment must both assign and specifically argue any alleged error.<sup>7</sup> Thus, an appellant whose hearsay objection was overruled by the trial court has the onus on appeal of showing that such statements were in fact hearsay and that no exception to or exclusion from the hearsay rule permitted its admission.<sup>8</sup> Leibel has failed to sufficiently argue grounds for reversal of the district court's ruling on his hearsay objection. We turn to his argument that the admission of exhibit 1 violated his confrontation rights.

[6] Where testimonial statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is

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<sup>5</sup> See Neb. Rev. Stat. §§ 27-802 and 27-803 (Reissue 2008).

<sup>6</sup> See *Flood v. Keller*, 214 Neb. 797, 336 N.W.2d 549 (1983).

<sup>7</sup> *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

<sup>8</sup> See *Menorah Medical Center v. Davis*, 463 S.W.2d 618 (Mo. App. 1971).

unavailable and there has been a prior opportunity for cross-examination.<sup>9</sup> There is no argument that the declarants of the hearsay statements contained in exhibit 1 were unavailable and that Leibel had a prior opportunity to cross-examine them. Whether Leibel's right to confrontation was violated thus depends entirely on whether the statements contained in the DMV records and in the certifications of those records were "testimonial." This presents an issue of first impression for our court.

To properly address this issue, a brief examination of the U.S. Supreme Court decision *Crawford v. Washington*,<sup>10</sup> and its progeny, is necessary. In *Crawford*, the U.S. Supreme Court held that, at a minimum, testimonial statements include formal statements by an accuser to government officers.<sup>11</sup> Thus, the wife's recorded statement during a police interrogation was subject to the Confrontation Clause. Later, in *Davis v. Washington*,<sup>12</sup> the Court similarly concluded that statements made during a police interrogation of a victim were "testimonial" if directed at establishing the facts of a past crime and not directed at current circumstances requiring police assistance.<sup>13</sup>

The Court explained in *Crawford* that the Confrontation Clause was crafted in response to the practice in England of reading in lieu of live testimony pretrial examinations of suspects and witnesses, which had previously been conducted by justices of the peace or other officials.<sup>14</sup> The Court said that the "Sixth Amendment must be interpreted with this focus in mind."<sup>15</sup>

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<sup>9</sup> See *State v. Sorensen*, *supra* note 3.

<sup>10</sup> *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

<sup>11</sup> See *id.*

<sup>12</sup> *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

<sup>13</sup> See *Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).

<sup>14</sup> *Crawford v. Washington*, *supra* note 10.

<sup>15</sup> *Id.*, 541 U.S. at 50.

In *Crawford*, the Court overruled *Ohio v. Roberts*,<sup>16</sup> which for a quarter of a century had stood for the proposition that the confrontation right does not bar admission of ex parte statements bearing adequate ““indicia of reliability.””<sup>17</sup> Thus, falling under a firmly rooted hearsay exception or otherwise bearing “‘particularized guarantees of trustworthiness,’” no longer defined when an ex parte statement was admissible without being subject to cross-examination.<sup>18</sup> The Court said in *Crawford* that the framers of the Constitution did not mean “to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”<sup>19</sup>

Subsequently, in *Melendez-Diaz v. Massachusetts*,<sup>20</sup> a more divided Court held that in a trial on charges of distributing cocaine, forensic analysis certifications that the substance seized from the defendant was cocaine, were “testimonial.” A plurality of the Court similarly held in *Bullcoming v. New Mexico*,<sup>21</sup> that ex parte statements certifying the results of the gas chromatograph machine, and prepared for a trial on charges for driving under the influence, were “testimonial.” The Court in *Bullcoming* rejected the idea that the analyst was not an ““accuser,””<sup>22</sup> and thus did not fall under the Sixth Amendment protection to be confronted with the “witnesses against him.” The Court noted in *Melendez-Diaz* that the analysts “prov[ed] one fact necessary for [the defendant’s] conviction.”<sup>23</sup>

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<sup>16</sup> *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

<sup>17</sup> *Michigan v. Bryant*, *supra* note 13, 562 U.S. at 353.

<sup>18</sup> *Crawford v. Washington*, *supra* note 10, 541 U.S. at 60.

<sup>19</sup> *Id.*, 541 U.S. at 61.

<sup>20</sup> *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

<sup>21</sup> *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).

<sup>22</sup> *Id.*, 564 U.S. at 659.

<sup>23</sup> *Melendez-Diaz v. Massachusetts*, *supra* note 20, 557 U.S. at 313. Accord *Bullcoming v. New Mexico*, *supra* note 21.

In both *Melendez-Diaz* and *Bullcoming*, the Court took pains to point out that the analysts were not “‘mere scrivener[s].’”<sup>24</sup> The Court in *Bullcoming* noted that the analyst had also certified that he received the blood sample intact, had adhered to a precise protocol in conducting the test, and had observed no circumstance or condition affecting the integrity of the sample or the validity of the analysis.<sup>25</sup> The Court in *Melendez-Diaz* explained at length how the scientific testing at issue in that case was not “immune from the risk of manipulation.”<sup>26</sup>

In *Melendez-Diaz*, the Court explicitly endorsed the “[v]arious formulations” of the “‘core class of testimonial statements,’” which it had first noted in *Crawford*.<sup>27</sup> That list included “‘*ex parte* in-court testimony or its functional equivalent,’” “‘similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’” and “‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.’”<sup>28</sup> Specific examples falling under these formulations included affidavits, depositions, prior testimony, confessions, custodial examination, and other formalized testimonial materials.<sup>29</sup>

The Court said in *Melendez-Diaz* that “the paradigmatic case identifies the core of the right to confrontation, not its limits.”<sup>30</sup> But, most recently, in *Williams v. Illinois*,<sup>31</sup> the Court said that “any further expansion [beyond the ‘modern-day practices that are tantamount to the abuses that gave rise to the recognition of the confrontation right’] would strain the constitutional text.”

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<sup>24</sup> *Bullcoming v. New Mexico*, *supra* note 21, 564 U.S. at 659..

<sup>25</sup> *Id.*

<sup>26</sup> *Melendez-Diaz v. Massachusetts*, *supra* note 20, 557 U.S. at 318.

<sup>27</sup> *Id.*, 557 U.S. at 310.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, 557 U.S. at 315.

<sup>31</sup> *Williams v. Illinois*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2221, 2242, 183 L. Ed. 2d 89 (2012).

Apparently to limit such further expansion of *Crawford*, several principles have “weaved in and out of the *Crawford* jurisprudence.”<sup>32</sup> The U.S. Supreme Court said in *Davis* that “formality” is “essential to testimonial utterance.”<sup>33</sup> In *Michigan v. Bryant*,<sup>34</sup> the Court noted that there can be “mixed motives” for a statement and that the proper inquiry is whether the declarant’s “‘primary purpose’” is “testimonial.” The Court in *Bryant* further said that “[i]n making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”<sup>35</sup>

Finally, in *Williams*, the Court focused on whether the “primary purpose” of the out-of-court statement was to “accus[e] a targeted individual” of engaging in criminal conduct.<sup>36</sup> The Court found that an analyst’s results from an independent laboratory conducting DNA testing on samples taken from the victim before any suspect was identified were not testimonial.<sup>37</sup> The Court explained that because there was no targeted individual at the time of testing, there was “no ‘prospect of fabrication’ and no incentive to produce anything other than a scientifically sound and reliable profile.”<sup>38</sup> Furthermore, in contrast to the attestations that were found to be “testimonial” in *Melendez-Diaz* and *Bullcoming*, the Court found it “significant” that due to the way the work of a DNA laboratory was divided up, “it is likely that the sole purpose of each technician [was] simply to perform his or her task in accordance with accepted procedures.”<sup>39</sup>

We have applied *Crawford* and its progeny to conclude that calibration certifications of alcohol breath simulator

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<sup>32</sup> *Bullcoming v. New Mexico*, *supra* note 21, 564 U.S. at 678 (Kennedy, J., dissenting; Bryer, C.J., and Alito, J., join).

<sup>33</sup> *Davis v. Washington*, *supra* note 12, 547 U.S. at 830 n.5.

<sup>34</sup> *Michigan v. Bryant*, *supra* note 13, 562 U.S. at 368, 369.

<sup>35</sup> *Id.*, 562 U.S. at 358-59.

<sup>36</sup> *Williams v. Illinois*, *supra* note 31, 132 S. Ct. at 2242.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, 132 S. Ct. at 2244.

<sup>39</sup> *Id.*

solutions<sup>40</sup> and documents certifying the accuracy of tuning forks for an officer's radar unit,<sup>41</sup> created in the course of routine duties at a time when they did not pertain to any particular pending matter, were not testimonial. In contrast, we have held that a certificate that a blood specimen was taken in "a medically acceptable manner," prepared at the request of law enforcement in connection with the arrest of the defendant, was testimonial.<sup>42</sup> We have never addressed whether public records or certifications of those public records that are prepared for the purpose of a pending prosecution are testimonial.

[7] We agree with numerous other courts that hold driving records are not testimonial.<sup>43</sup> In *Melendez-Diaz*, the Court said that unless the regularly conducted activity of the business is the production of evidence for use at trial, business records are not testimonial.<sup>44</sup> They are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial."<sup>45</sup> Although the employees who create driving records may reasonably believe the records will be available for some possible future prosecution, the sole purpose of creating driving records is not to create evidence for trials.<sup>46</sup> The creation and maintenance of driving records is a ministerial duty for the benefit of the public,<sup>47</sup> utilized by drivers for many purposes, including the procurement of insurance or of

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<sup>40</sup> *State v. Britt*, 283 Neb. 600, 813 N.W.2d 434 (2012); *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

<sup>41</sup> *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007).

<sup>42</sup> *State v. Sorensen*, *supra* note 3, 283 Neb. at 937, 814 N.W.2d at 377.

<sup>43</sup> See, e.g., *State v. King*, 213 Ariz. 632, 146 P.3d 1274 (Ariz. App. 2006); *Card v. State*, 927 So. 2d 200 (Fla. App. 2006); *State v. Shipley*, 757 N.W.2d 228 (Iowa 2008); *Com. v. McMullin*, 76 Mass. App. 904, 923 N.E.2d 1062 (2010); *State v. Vonderharr*, 733 N.W.2d 847 (Minn. App. 2007); *State v. Davis*, 211 Or. App. 550, 156 P.3d 93 (2007).

<sup>44</sup> *Melendez-Diaz v. Massachusetts*, *supra* note 20.

<sup>45</sup> *Id.*, 557 U.S. at 324.

<sup>46</sup> See *State v. Vonderharr*, *supra* note 43.

<sup>47</sup> See, e.g., Neb. Rev. Stat. § 60-483 (Reissue 2010). See, also, *State v. Vonderharr*, *supra* note 43.

commercial driving licenses.<sup>48</sup> It is clear that driving records do not fit within any of the U.S. Supreme Court's articulations of the "testimonial" test. Rather, they are prepared during routine duties at a time when they do not pertain to any particular pending matter. DMV employees, in such circumstances, are not "accusers" against a defendant.

Johnson's signature certifying that the driving abstract represented a true and exact copy of Leibel's operating record and Hraban's certification of authenticity of the abstract and its accompanying DMV documents present a more complex question. Johnson's signature was required for the admissibility of the driving abstract as a self-authenticating official record.<sup>49</sup> Hraban's signature was necessary for the admission of the accompanying documents.<sup>50</sup>

Read expansively, *Melendez-Diaz* might be interpreted to include sworn certificates that authenticate and summarize routine governmental records.<sup>51</sup> After all, such certifications are solemn statements "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"<sup>52</sup>

Yet most courts have determined that such certifications are not testimonial.<sup>53</sup> Put most simply, if "'the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do[es].'"<sup>54</sup>

Interestingly, in *Melendez-Diaz*, the majority opinion commented that the dissent had identified but "a single class of

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<sup>48</sup> See Neb. Rev. Stat. § 60-2907 (Reissue 2010).

<sup>49</sup> See Neb. Rev. Stat. § 27-902 (Reissue 2008).

<sup>50</sup> See *id.*

<sup>51</sup> *State v. Murphy*, 991 A.2d 35 (Me. 2010).

<sup>52</sup> *Crawford v. Washington*, *supra* note 10, 541 U.S. at 52.

<sup>53</sup> See, *U.S. v. Adefehinti*, 510 F.3d 319 (D.C. Cir. 2007); *State v. Bennett*, 216 Ariz. 15, 162 P.3d 654 (Ariz. App. 2007); *State v. Murphy*, *supra* note 51; *Com. v. McMullin*, *supra* note 43; *State v. Vonderharr*, *supra* note 43; *Jasper v. Com.*, 49 Va. App. 749, 644 S.E.2d 406 (2007). But see *Com. v. Parenteau*, 460 Mass. 1, 948 N.E.2d 883 (2011).

<sup>54</sup> *State v. Adefehinti*, *supra* note 53, 510 F.3d at 328.

evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record—or a copy thereof—for use as evidence.”<sup>55</sup> The Court did not explicitly hold that such certifications were testimonial, but the Court distinguished traditional certifications from the analyst's report the Court found testimonial in that case. Unlike a clerk's certificate authenticating an official record, the Court explained, the analyst's certificate was created for “the sole purpose of providing evidence against a defendant.”<sup>56</sup>

As the Court in *Melendez-Diaz* alluded to and other courts have reasoned, certificates of authenticity are not really offered to “prov[e] one fact necessary for [the defendant's] conviction.”<sup>57</sup> They do not have the “primary purpose of accusing a targeted individual,”<sup>58</sup> in the sense that they do not, in and of themselves, describe any criminal wrongdoing of the defendant.<sup>59</sup> The purpose of the certification is merely to establish the authenticity of documents that were prepared in a nonadversarial setting before the institution of the criminal proceeding.<sup>60</sup> It was the attached abstract and documents, not the certifications, which proved Leibel was driving without an ignition interlock permit.<sup>61</sup>

[8] Records custodians, in the capacity of authenticating documents as true and exact copies of the records on file, are more akin to the “scriveners,” and the process of certifying the authenticity of a public record leaves little room for manipulation or fabrication. “Because neutral, bureaucratic information from routinely maintained public records is not obtained by use of specialized methodology, there is little, if any, practical benefit to applying the crucible of cross-examination against

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<sup>55</sup> *Melendez-Diaz v. Massachusetts*, *supra* note 20, 557 U.S. at 322.

<sup>56</sup> *Id.*, 557 U.S. at 323.

<sup>57</sup> *Id.*, 557 U.S. at 313.

<sup>58</sup> *Williams v. Illinois*, *supra* note 31, 132 S. Ct. at 2225.

<sup>59</sup> See *Jasper v. Com.*, *supra* note 53.

<sup>60</sup> See, *State v. Shipley*, *supra* note 43; *Jasper v. Com.*, *supra* note 53.

<sup>61</sup> See *State v. Bennett*, *supra* note 53.

those who maintain the information.”<sup>62</sup> “[C]ross-examination is a tool used to flesh out the truth, not an empty procedure.”<sup>63</sup> We conclude that Hraban’s and Johnson’s statements authenticating that the records contained in exhibit 1 were true and exact copies, and were not “testimonial.”

Leibel points out, however, that Hraban’s certification went beyond the traditional bounds of a records custodian when she stated, “I further add that this person did not have a Work or Ignition Interlock Permit on 10/03/2011.” The Court in *Melendez-Diaz*, when discussing certifications of authenticity, distinguished certifications by records custodians under a “‘narrowly circumscribed’” authority to “‘certify to the correctness of a copy of a record kept in his office’” from circumstances where a clerk attests, *ex parte*, that he or she had “searched for a particular relevant record and failed to find it.”<sup>64</sup> The Court explained that, traditionally, a clerk certifying a record had “‘no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect.’”<sup>65</sup> Later, in *Norwood v. United States*,<sup>66</sup> the Court vacated a Ninth Circuit decision that deemed nontestimonial a clerk’s certification of the absence of a fact relevant to the prosecution, upon a diligent search of the department’s files. The U.S. Supreme Court remanded the cause for further consideration in light of *Melendez-Diaz*.

Hraban’s statement was an “‘interpretation of what the record contains or shows.’”<sup>67</sup> It was “testimonial” under the stated dictum in *Melendez-Diaz*. Nevertheless, because of the continuing evolution of *Crawford*, courts are divided on whether this kind of rote summarization of an attached record

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<sup>62</sup> *State v. Murphy*, *supra* note 51, 991 A.2d at 43.

<sup>63</sup> *Crawford v. Washington*, *supra* note 10, 541 U.S. at 74 (Rehnquist, C.J., concurring in the judgment; O’Connor, J., joins).

<sup>64</sup> *Melendez-Diaz v. Massachusetts*, *supra* note 20, 557 U.S. at 322-23.

<sup>65</sup> *Id.*, 557 U.S. at 322.

<sup>66</sup> *Norwood v. United States*, 558 U.S. 983, 130 S. Ct. 491, 175 L. Ed. 2d 339 (2009) (granting petition for writ of certiorari).

<sup>67</sup> *Melendez-Diaz v. Massachusetts*, *supra* note 20, 557 U.S. at 322.

is “testimonial.”<sup>68</sup> We find the resolution of this particular point unnecessary in this case. Even if Hraban’s statement was “testimonial,” it was plainly redundant to the information contained in the abstract itself. And because this was a bench trial, there was little risk that the finder of fact was unduly influenced by this “official” summary of the record or was unable to glean the relevant fact from the unsummarized DMV record. Any possible violation of Leibel’s right to confrontation was undoubtedly harmless.

[9,10] The improper admission of statements in violation of the right to confrontation is a trial error subject to harmless error review.<sup>69</sup> The U.S. Supreme Court in *Chapman v. California*<sup>70</sup> held that where the trial error is of a constitutional dimension, the burden must be on the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. This standard applies equally to both jury and bench trials.<sup>71</sup> We have sometimes said that in a bench trial, it is the appellant’s burden to show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence; if there is other sufficient evidence supporting the finding of guilt, the conviction will not be reversed.<sup>72</sup> But this rule of expediency has never been

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<sup>68</sup> See *State v. Woodbury*, 13 A.3d 1204 (Me. 2011). Compare *Washington v. State*, 18 So. 3d 1221 (Fla. App. 2009).

<sup>69</sup> See, *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); *State v. Sorensen*, *supra* note 3; *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001).

<sup>70</sup> *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

<sup>71</sup> See, *Fahy v. Connecticut*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963) (approved of in *Chapman v. California*, *supra* note 70); Robert E. Larsen, Navigating the Federal Trial § 13:19 (2013). See, also, *Hawkins v. LeFevre*, 758 F.2d 866 (2d Cir. 1985); *Matter of Juvenile Action No. 97036-02*, 164 Ariz. 306, 792 P.2d 769 (Ariz. App. 1990); *Gipson v. State*, 844 S.W.2d 738 (Tex. Crim. App. 1992); *State v. Read*, 147 Wash. 2d 238, 53 P.3d 26 (2002).

<sup>72</sup> See, *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009); *State v. Craigie*, 19 Neb. App. 790, 813 N.W.2d 521 (2012); *State v. McCurry*, 5 Neb. App. 526, 561 N.W.2d 244 (1997).

clearly applied to constitutional rights, and we will not apply a presumption here that would shift the burden of proof to the defendant.<sup>73</sup>

Nevertheless, whether the error is harmless in a particular case depends “upon a host of factors,”<sup>74</sup> and we find the fact of a bench trial a proper consideration in conducting our *Chapman* harmless error review. Harmless error review ultimately looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.<sup>75</sup> The admission of Hraban’s gratuitous statement summarizing a fact clearly discernible by the district court from the attached driving abstract surely did not contribute to the guilty verdict in this case.

Finding no merit to Leibel’s assignments of error concerning exhibit 1, we turn to Leibel’s assignments of error relating to the statute under which he was charged.

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<sup>73</sup> See, *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991); *State v. Schroder*, 232 Neb. 65, 439 N.W.2d 489 (1989). But see, e.g., *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002); *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000). See, also, e.g., Note, *Applicability of Rules of Evidence Where the Judge Is the Trier of Facts in an Action at Law*, 42 Harv. L. Rev. 258 (1928).

<sup>74</sup> *Delaware v. Van Arsdall*, *supra* note 69, 475 U.S. at 684. See, also, e.g., *U.S. v. Mohamed*, No. 12-2835, 2013 WL 4259495 (8th Cir. Aug. 16, 2013); *U.S. v. Rosalez*, 711 F.3d 1194 (10th Cir. 2013), *cert. denied* \_\_\_ U.S. \_\_\_, 134 S. Ct. 336, 187 L. Ed. 2d 235; *U.S. v. Cameron*, 699 F.3d 621 (1st Cir. 2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 1845, 185 L. Ed. 2d 850 (2013); *State v. Mitchell*, 296 Conn. 449, 996 A.2d 251 (2010); *State v. Levell*, 128 Haw. 34, 282 P.3d 576 (2012); *People v. Stechly*, 225 Ill. 2d 246, 870 N.E.2d 333, 312 Ill. Dec. 268 (2007); *State v. Holman*, 295 Kan. 116, 284 P.3d 251 (2012); *State v. Wille*, 559 So. 2d 1321 (La. 1990); *Com. v. Vasquez*, 456 Mass. 350, 923 N.E.2d 524 (2010); *State v. Pradubsri*, 403 S.C. 270, 743 S.E.2d 98 (S. C. App. 2013); *State v. Tribble*, 67 A.3d 210 (Vt. 2012); *State v. Jasper*, 174 Wash. 2d 96, 271 P.3d 876 (2012).

<sup>75</sup> *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

§ 60-6,197.06(1)

Leibel asserts that § 60-6,197.06(1) was not the proper statute under which to charge him. A violation of § 60-6,197.06(1) is a Class IV felony. Leibel argues that § 60-6,197.06(1) clearly encompasses only those drivers who are operating a vehicle during a time when they are ineligible by court order to drive even with an ignition interlock device and permit. Because he was eligible to drive with a device and permit, Leibel claims the State should have instead charged him with violating § 60-6,211.05(5). Section 60-6,211.05(5), since repealed,<sup>76</sup> set forth the misdemeanor offense of driving a vehicle without an ignition interlock device “in violation of the requirements of the court order.” The relevant language of § 60-6,197.06(1) states: “Unless otherwise provided by law pursuant to an ignition interlock permit, any person operating a motor vehicle . . . while his or her operator’s license has been revoked . . . shall be guilty of a Class IV felony.” Section 60-6,211.05(5) stated in full:

A person who tampers with or circumvents an ignition interlock device installed under a court order while the order is in effect, who operates a motor vehicle which is not equipped with an ignition interlock device in violation of a court order made pursuant to this section, or who otherwise operates a motor vehicle equipped with an ignition interlock device in violation of the requirements of the court order under which the device was installed shall be guilty of a Class II misdemeanor.

In *Hernandez*,<sup>77</sup> we considered whether a driver who had a permit but then drove without the ignition interlock device committed a felony under § 60-6,197.06(1). We said that the introductory exclusionary clause of § 60-6,197.06(1) must be read in *pari materia* with other applicable statutes specifically crafted for ignition interlock device violations, such as § 60-6,211.05(5). We concluded that a driver who operated a vehicle with a permit but without an ignition interlock device violated § 60-6,211.05(5), instead of § 60-6,197.06(1).

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<sup>76</sup> See 2011 Neb. Laws, L.B. 667, § 40.

<sup>77</sup> *State v. Hernandez*, *supra* note 1.

We said that the introductory exclusionary clause of § 60-6,197.06(1) meant “‘unless a person has an [ignition] interlock *permit*.’”<sup>78</sup> “[O]ther statutes,” such as § 60-6,211.05(5) “charge a person who violates the terms of his or her ignition interlock *permit*.’”<sup>79</sup>

The State argues that Leibel’s conduct is distinguishable from the conduct of the defendant in *Hernandez* because Leibel did not obtain a permit before driving without an ignition interlock device. We agree. Section 60-6,197.06(1) states that “any person operating a motor vehicle . . . while his or her operator’s license has been revoked” is guilty of a Class IV felony under that section “[u]nless otherwise provided by law pursuant to an ignition interlock *permit*.” (Emphasis supplied.) For whatever reason, the Legislature chose to draw the line at obtaining a permit. While the exclusionary clause of § 60-6,197.06(1) does not clearly encompass drivers (such as the defendant in *Hernandez*) who obtain a permit but who then drive without an ignition interlock device, we find no similar ambiguity for drivers who neglect to obtain the permit. One cannot be operating a vehicle “provided by law pursuant to an ignition interlock *permit*,” if the driver does not have a permit.<sup>80</sup> Leibel did not have a permit, and thus, he did not fall under this exception to the felony provisions of § 60-6,197.06(1). The district court accordingly did not err in convicting Leibel of violating § 60-6,197.06(1).

#### EXCESSIVE SENTENCE

[11] Lastly, Leibel asserts that the sentence of 90 days’ jail time was excessive. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge’s observation of the defendant’s demeanor and attitude and all the facts and circumstances surrounding the defendant’s life.<sup>81</sup> Given Leibel’s criminal record and the fact that,

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<sup>78</sup> *Id.* at 427, 809 N.W.2d at 283 (emphasis supplied).

<sup>79</sup> *Id.* (emphasis supplied).

<sup>80</sup> See § 60-6,197.06(1) (emphasis supplied).

<sup>81</sup> *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009).

as the district court noted, this was a probation violation, we conclude that the district court did not abuse its discretion in sentencing Leibel to 90 days in jail.

### CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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SHAWN T. STRASBURG, APPELLEE, v. UNION PACIFIC  
RAILROAD COMPANY, A DELAWARE  
CORPORATION, APPELLANT.  
839 N.W.2d 273

Filed November 1, 2013. No. S-12-999.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Contracts: Compromise and Settlement: Appeal and Error.** Allocation of a settlement agreement is reviewed for an abuse of discretion.
3. **Torts: Damages.** The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.
4. **Torts: Damages: Tort-feasors: Liability.** The theory underlying the collateral source rule is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.
5. **Torts: Damages: Insurance: Tort-feasors.** Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages. But if the tort-feasor contributed in some way to the benefits provided to the injured person, then the tort-feasor might be entitled to mitigation of damages.
6. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
7. **Federal Acts: Railroads: Employer and Employee: Liability: Compromise and Settlement.** Under the Federal Employers' Liability Act (FELA), when an injured employee has alleged that both a FELA and a non-FELA defendant are responsible for the injury, the majority rule holds that a settlement with the non-FELA defendant results in a dollar-for-dollar offset in the judgment against the nonsettling FELA defendant.
8. **Federal Acts: Railroads: Liability: Compromise and Settlement.** There is no loss of consortium recovery in an action under the Federal Employers' Liability

Act, and any settlement reached on a loss of consortium claim is not subject to setoff against the defendant in such action.

9. **Contracts: Compromise and Settlement: Proof.** The burden to show that the allocation set forth in a settlement agreement was not reasonable lies with the party seeking credit against the settlement.
10. **Judgments: Appeal and Error.** As a general proposition, an appellate court does not require a district court to explain its reasoning. Only in certain situations is a court required to make findings of fact, typically by request, or as required by statute or court rule.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Gary J. Nedved and Joel Bacon, of Keating, O’Gara, Nedved & Peter, P.C., L.L.O., for appellant.

William Kvas, Richard J. Dinsmore, and Katie Figgins for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

## I. INTRODUCTION

Shawn T. Strasburg filed an action under the Federal Employers’ Liability Act (FELA), 45 U.S.C. § 51 et seq. (2006), against Union Pacific Railroad Company (Union Pacific). Strasburg alleged that he was injured in the course of his employment and that his injuries were caused by Union Pacific’s negligence. A jury trial was held, and a verdict was entered for Strasburg in the amount of \$1,032,375.43. Following trial, the district court allowed Union Pacific to set off the verdict in the amount of \$425,000 because of a settlement reached with another defendant, and additionally enforced a medical lien in the amount of \$139,845.03 against that settlement. Union Pacific appeals.

## II. FACTUAL BACKGROUND

On March 12, 2009, Strasburg was employed as a carman for Union Pacific. On that day, he was attending a Union Pacific safety class taught by Union Pacific employees. That class was held at a community college in North Platte, Nebraska,

in a classroom which was solely dedicated to the instruction of Union Pacific employees. Ironically, while Strasburg was attending this safety class, the chair upon which Strasburg was seated collapsed, causing injury to Strasburg's back which necessitated disk replacement surgery.

Strasburg filed a FELA action against Union Pacific and also filed suit against the manufacturer of the chair, Steelcase Inc. (Steelcase). In addition, Strasburg's wife, Robin Strasburg, filed suit against Steelcase, alleging loss of consortium. Strasburg and Robin settled their case against Steelcase for \$725,000. Per the terms of the agreement, the settlement was allocated at \$425,000 for Strasburg's claim and \$300,000 for Robin's claim.

Prior to trial, Union Pacific filed for a medical lien against the Steelcase settlement in the amount of \$135,151.01, the amount it had paid out on Strasburg's behalf as of that time. A hearing was held, but the district court declined to enforce the lien at that time, concluding that the lien rights should not be determined until after the conclusion of the FELA action.

A jury trial was held. The primary issue litigated at trial was of causation. There was no dispute at trial regarding the necessity or payment of Strasburg's medical bills. The trial court admitted exhibit 27, which was a list of Strasburg's medical and prescription expenses. That exhibit indicated that Strasburg had total medical expenses of \$261,413.43 as billed by the providers. This exhibit was the only evidence presented at trial regarding medical expenses; Union Pacific and Strasburg stipulated to its admissibility. But in fact, Union Pacific had contracted with Strasburg's medical providers to pay a reduced rate on Strasburg's behalf, an amount reflected in the various medical liens Union Pacific filed against Strasburg.

The jury returned a general verdict for Strasburg in the amount of \$1,032,375.43. Neither party requested a special verdict form.

Following the verdict, Union Pacific filed a motion for new trial and a renewed motion to enforce the medical lien against settlement proceeds. The latter motion requested a lien on the Steelcase settlement in the amount of \$139,945.03, or the

amount that had been paid out to date in medical benefits on Strasburg's behalf. Though not entirely clear from the record, it appears the difference in the lien amount sought prior to and after trial was due to other bills that had been paid by Union Pacific in the interim.

A hearing was held on these motions. Several issues were discussed at that hearing. One issue was the motion for new trial, which was later denied. Any issues relating to that denial have not been appealed.

Also at issue at the hearing was the lien for medical expenses and the appropriate amount of the medical expense setoff. Union Pacific alleged that it was entitled to a lien against the Steelcase settlement in the amount of \$139,945.03 for medical expenses paid, and was also entitled to a setoff for the difference between the total amount of Strasburg's bills—\$261,413.43—and the amount actually paid to settle those bills—\$139,945.03—or \$121,468.40. Explained simply, Union Pacific argues that it was entitled to a setoff of the entire amount of Strasburg's medical expenses—\$261,413.43—and not just a setoff for the amount actually paid to settle those bills.

Finally, Union Pacific sought a setoff for the amount of the settlement with Steelcase that was attributable to Strasburg's claims. But Union Pacific alleged that the allocation reflected in the settlement agreement—\$425,000 for Strasburg and \$300,000 for Robin—should be modified to more accurately reflect the relative injury suffered by each.

The district court granted the motion to enforce the medical lien for the amount paid by Union Pacific, but denied Union Pacific's request to set off the remainder of the medical expenses as reflected in exhibit 27. (Note that the district court allowed the lien in the amount of \$139,845.03, although Union Pacific had requested a lien in the amount of \$139,945.03. This \$100 difference was apparently the result of an error by the district court, with which the parties do not take issue on appeal.) The district court declined to modify the allocation of the Steelcase settlement, but allowed Union Pacific a setoff of \$425,000 against the jury verdict for that settlement.

Union Pacific appeals.

### III. ASSIGNMENTS OF ERROR

Union Pacific assigns that the district court erred in (1) not allowing a setoff of the portion of Strasburg's medical bills that were written off by Strasburg's medical providers as a result of negotiations between Union Pacific and the providers and (2) not modifying the allocation of the Strasburgs' settlement with Steelcase and setting off that reallocated amount from the verdict.

### IV. STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.<sup>1</sup>

[2] Allocation of a settlement agreement is reviewed for an abuse of discretion.

### V. ANALYSIS

#### 1. SETOFF FOR MEDICAL EXPENSES

On appeal, Union Pacific assigns that the district court erred in not permitting it to set off the portion of Strasburg's medical bills as reflected in exhibit 27 that were written off by Strasburg's medical providers as a result of negotiations between Union Pacific and the providers, an amount referred to herein as the "writeoff amount." We note Strasburg's medical expenses were paid by Union Pacific Railroad Employees Health Systems, which is a third-party administrator for Union Pacific's health plan. Any rights Union Pacific Railroad Employees Health Systems might have against Strasburg have been assigned to Union Pacific, and accordingly, we refer to Union Pacific Railroad Employees Health Systems as "Union Pacific" for ease of comprehension.

There is no dispute that Union Pacific is entitled to a lien for the amount actually paid; such a lien was requested by Union Pacific and enforced by the district court. The only issue on appeal is whether the district court erred when it denied Union Pacific's request to also set off the writeoff amount.

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<sup>1</sup> *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

(a) Legal Framework

[3-5] We begin with an explanation of the underlying legal principles, in particular the collateral source rule and 45 U.S.C. § 55. The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.<sup>2</sup> The theory underlying the adoption of this rule by a majority of jurisdictions is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.<sup>3</sup> Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages.<sup>4</sup> But if the tort-feasor contributed in some way to the benefits provided to the injured person, then the tort-feasor might be entitled to mitigation of damages.<sup>5</sup>

This common-law rule was codified, with modifications, by 45 U.S.C. § 55:

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

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<sup>2</sup> *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

<sup>3</sup> *Id.*

<sup>4</sup> *Fickle v. State*, 274 Neb. 267, 759 N.W.2d 113 (2007).

<sup>5</sup> See *Huenink v. Collins*, 181 Neb. 195, 147 N.W.2d 508 (1966) (citing 25 C.J.S. *Damages* § 99(2) (1966)).

This section has been interpreted to mean that if the intent of “any sum . . . contributed or paid to any insurance, relief benefit, or indemnity” was in exchange for indemnification from FELA liability, then setoff is appropriate.<sup>6</sup> If not, and if the intent of the sum is to provide some type of benefit akin to compensation, then setoff is impermissible.<sup>7</sup> It is generally accepted that although under 45 U.S.C. § 55 a railroad may set off only the amount of the premiums and not what the premiums bought, this “harsh result” can be avoided “by specific provision in the collective bargaining agreement.”<sup>8</sup>

The collective bargaining agreement that governs the employment relationship between Union Pacific and Strasburg contains such a provision. As such, Union Pacific and Strasburg’s union contracted for a limited waiver of FELA liability. In return for the payment of certain benefits—in this case, via a health plan which paid all expenses related to an on-the-job injury—Union Pacific was entitled to indemnification from FELA liability. The question remaining is the value of that indemnification.

#### (b) Amount of Setoff

Union Pacific contends that in denying its request for a setoff of the writeoff amount, Union Pacific was denied the benefit of its bargain under the collective bargaining agreement and Strasburg was granted a windfall. Strasburg disagrees and argues that Union Pacific is entitled to set off only those funds which it paid to settle his medical bills.

Resolution of this issue is a legal question involving the interpretation of 45 U.S.C. § 55, namely whether the writeoff amount is “any sum . . . contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee.”

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<sup>6</sup> See *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377 (9th Cir. 1987).

<sup>7</sup> See *id.*

<sup>8</sup> *Blake v. Delaware and Hudson Railway Company*, 484 F.2d 204, 207 (2d Cir. 1973) (Friendly, J., concurring). See *Folkestad v. Burlington Northern, Inc.*, *supra* note 6.

[6] Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.<sup>9</sup> And the plain meaning of the language used by Congress when drafting 45 U.S.C. § 55 was that an employer may set off any sum paid or contributed. Union Pacific did pay certain funds on Strasburg's behalf and is undisputedly entitled to a setoff of \$139,845.03 for that payment. But it did not pay or contribute the writeoff amount, and it is not entitled to set off such amount under the plain language of 45 U.S.C. § 55.

Nor are we convinced by Union Pacific's argument that Strasburg received a windfall where the jury awarded the medical expenses as billed, when in fact Strasburg paid none of those expenses. The jury's verdict was a general one, and thus it is not possible to know what amount was actually awarded to Strasburg for his medical expenses.

Moreover, Union Pacific did not object to exhibit 27, the exhibit which listed all of Strasburg's medical expenses, and in fact, Union Pacific stipulated to its admission. Union Pacific did not offer any other evidence contradicting the impression left by exhibit 27 that the medical expenses in that exhibit were actually incurred in full by Strasburg.

The plain language of 45 U.S.C. § 55 does not provide for a setoff of the insurance writeoff amount. And the record shows that Union Pacific failed to take actions that might have prevented the award of medical expenses which Union Pacific claims the jury made and with which Union Pacific now takes issue. On these facts, the statute does not require, and equity does not demand, that Union Pacific's request be granted. As such, we conclude that the district court did not err in denying Union Pacific's request for setoff of that amount.

Union Pacific's first assignment of error is without merit.

## 2. SETOFF OF STEELCASE SETTLEMENT

On appeal, Union Pacific assigns that the district court erred in not closely scrutinizing the Strasburgs' settlement with Steelcase. Union Pacific contends the settlement overallocated

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<sup>9</sup> *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012).

funds to Robin's loss of consortium claim while underfunding Strasburg's claim in an effort to reduce the amount of that settlement, which was subject to setoff by any verdict received against Union Pacific.

(a) Factual and Procedural Background

Prior to trial, Strasburg and Robin settled their action against Steelcase, the company that manufactured the chair on which Strasburg was sitting when he was injured. The total settlement was for \$725,000. By the terms of the settlement, \$425,000 was allocated to Strasburg's claim and \$300,000 was allocated to Robin's loss of consortium claim.

Following the verdict, Union Pacific filed for a setoff of the settlement proceeds and additionally requested that the district court reallocate more of the settlement to Strasburg. At a hearing held postverdict on various motions, Union Pacific introduced into evidence the settlement agreement, a loss of earning capacity report on Strasburg, and a deposition taken of Robin. Following the hearing at which the record was left open, Strasburg filed an affidavit on the issue of the settlement allocation.

The district court granted Union Pacific's request for setoff for the Steelcase settlement for \$425,000, the amount allocated to Strasburg's claim in the settlement agreement. The district court noted that it had reviewed the briefs and records, but did not otherwise make any findings regarding the allocation.

(b) Analysis

[7,8] Under FELA, when an injured employee has alleged that both a FELA and a non-FELA defendant are responsible for the injury, the majority rule holds that a settlement with the non-FELA defendant results in a dollar-for-dollar offset in the judgment against the nonsettling FELA defendant.<sup>10</sup> But there is no loss of consortium recovery in a FELA action, and any settlement reached on a loss of consortium claim is not subject to setoff against the FELA defendant.<sup>11</sup>

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<sup>10</sup> See *Schadel v. Iowa Interstate R.R., Ltd.*, 381 F.3d 671 (7th Cir. 2004).

<sup>11</sup> See *Dixon v. CSX Transp., Inc.*, 990 F.2d 1440 (4th Cir. 1993).

Union Pacific directs us to case law suggesting, at least in the workers' compensation context, that a trial court has the responsibility to closely scrutinize a settlement agreement to ensure that an employer's rights are not abused.<sup>12</sup> Union Pacific further contends that the district court wholly failed to scrutinize this settlement. While we agree with Union Pacific that a district court should not simply rubberstamp a previous settlement in this context, we disagree that the district court failed to adequately scrutinize this settlement.

[9] The burden to show that the allocation set forth in the Steelcase settlement was not reasonable lies with the party seeking credit against the settlement, in this case Union Pacific.<sup>13</sup> In an attempt to meet its burden, Union Pacific introduced an earning capacity report regarding Strasburg, and also introduced Robin's deposition testimony, in which Robin indicated that at the time of the settlement, it was not expected that Strasburg would ever work again. In addition, Robin testified that it was expected Strasburg would need further surgery, and that her duties as a parent had significantly increased because she did many of those duties on her own—in addition to her duties caring for Strasburg because of his injuries.

In response, Strasburg offered his affidavit indicating that contrary to Robin's testimony, Strasburg had submitted to his physician for comment and review a list of jobs at Union Pacific that he would be able to perform with his likely physical restrictions. While it was not definitively decided, Strasburg contends that at the time of settlement, it was likely that he would be able to return to work.

[10] Union Pacific argues that the lack of specific findings by the district court shows that the district court failed to consider the reasonableness of the allocation set forth in the settlement. As a general proposition, this court does not require

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<sup>12</sup> See, *Rains v. Kolberg Mfg. Corp.*, 897 P.2d 845 (Colo. App. 1994); *Blagg v. Ill. F.W.D. Truck & Equip. Co.*, 143 Ill. 2d 188, 572 N.E.2d 920, 157 Ill. Dec. 456 (1991).

<sup>13</sup> See, *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995); *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993).

a district court to explain its reasoning. Only in certain situations is a court required to make findings of fact, typically by request,<sup>14</sup> or as required by statute<sup>15</sup> or court rule.<sup>16</sup> And our review of the district court's record does not suggest that the district court failed to examine the settlement agreement simply because it did not make specific findings.

First, no request was made asking for such specific findings. Further, the record, in particular the district court's order on this issue, shows that the district court presided over the trial in this matter, received a motion regarding the proper amount of setoff, and then held a hearing on the setoff request. And the order disposing of Union Pacific's motion specifically noted that the district court had reviewed the briefs and record.

We decline to presume that the district court simply failed to consider the motion filed before it when it did not make findings which no Nebraska case, statute, or rule required of it, particularly in light of the fact that the language of the order clearly shows that the request was considered. We reject Union Pacific's suggestion that the district court failed to consider the reasonableness of the agreement. Rather, we review the district court's order for an abuse of discretion<sup>17</sup> and find none.

The evidence presented at the hearing showed that Robin was essentially a single parent to the Strasburgs' four children. At one point, Robin had a job to help support the family, but was unable to both work and parent her children effectively. Strasburg, particularly in the time following the accident and subsequent medical care and surgery, was not able to provide much assistance. More surgery was expected. The couple's

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<sup>14</sup> *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980) (district court must make specific findings upon request of party).

<sup>15</sup> See, *In re Interest of Shaquille H.*, 285 Neb. 512, 827 N.W.2d 501 (2013) (motion to discharge—speedy adjudication); *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009) (motion to discharge—speedy trial); *State v. Constanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990) (postconviction).

<sup>16</sup> Neb. Ct. R. § 4-203 (rev. 2011).

<sup>17</sup> See 47 Am. Jur. 2d *Judgments* § 830 (2006).

marriage was strained by the injury and by its emotional and physical toll on Strasburg. Money was tight; Robin described it as "living penny by penny." The couple had to borrow from Robin's father, who was retired and on a fixed income, in order to survive. The children were not able to participate in sports or other activities.

Union Pacific makes much of the fact that Robin was not employed during this time, while Strasburg's injury meant that the couple was without his wages. Union Pacific also notes that when the Steelcase settlement was entered, the couple did not believe that Strasburg would ever work again. But that was contradicted by Strasburg's affidavit, which suggested that it was not a foregone conclusion that he would not work again. And in fact, the record shows that Strasburg is back at work as a carman for Union Pacific, admittedly with some physical restrictions.

Given this evidence, and the evidence presented at trial, it cannot be said that the district court abused its discretion in concluding that the settlement was allocated appropriately by the settlement agreement. The fact that the district court did not make findings or otherwise explain its decision does not prevent us from reaching that decision.

Union Pacific's second assignment of error is without merit.

## VI. CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

SERVICE EMPLOYEES INTERNATIONAL UNION (AFL-CIO)  
LOCAL 226, APPELLANT AND CROSS-APPELLEE, V.  
DOUGLAS COUNTY SCHOOL DISTRICT 001,  
APPELLEE AND CROSS-APPELLANT.  
839 N.W.2d 290

Filed November 1, 2013. No. S-13-009.

1. **Commission of Industrial Relations: Appeal and Error.** In reviewing an appeal from the Commission of Industrial Relations in a case involving wages and conditions of employment, an order or decision of the commission may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Labor and Labor Relations.** Nebraska's Industrial Relations Act requires parties to negotiate only mandatory subjects of bargaining.
3. \_\_\_\_\_. Mandatory subjects of bargaining include the scale of wages, hours of labor, or conditions of employment.
4. \_\_\_\_\_. Management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining.
5. \_\_\_\_\_. A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative.
6. \_\_\_\_\_. Vacation is a mandatory subject of bargaining.
7. **Commission of Industrial Relations: Labor and Labor Relations.** An employer subject to the Industrial Relations Act may implement unilateral changes to mandatory subjects of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the Commission of Industrial Relations.
8. **Labor and Labor Relations: Employment Contracts: Waiver.** A clear and unmistakable waiver of a statutory right may be found in the express language of a collective bargaining agreement, or it may even be implied from the structure of an agreement and the parties' course of conduct.
9. **Labor and Labor Relations: Waiver: Proof.** An employer bears the burden of establishing that a clear and unmistakable waiver of a statutory right in a collective bargaining agreement has occurred.
10. \_\_\_\_\_. \_\_\_\_\_. \_\_\_\_\_. To establish waiver of the right to bargain by union inaction, the employer must first show that the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so

as to allow a reasonable opportunity to bargain about the change. In addition, the employer must show that the union failed to make a timely bargaining request before the change was implemented.

11. **Labor and Labor Relations: Notice.** Once a union has notice of a proposed change in a mandatory bargaining subject, it must make a timely request to bargain. A union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table.
12. **Commission of Industrial Relations: Courts: Evidence: Appeal and Error.** The Nebraska Supreme Court will consider the fact that the Commission of Industrial Relations, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the commission's judgment as to credibility.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the Commission of Industrial Relations.  
Affirmed.

Timothy S. Dowd, of Dowd, Howard & Corrigan, L.L.C.,  
for appellant.

David J. Kramer and D. Ashley Robinson, of Baird Holm,  
L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK,  
and CASSEL, JJ.

WRIGHT, J.

## I. NATURE OF CASE

Service Employees International Union (AFL-CIO) Local 226 (Local 226) appeals from the finding of the Commission of Industrial Relations (CIR) that Douglas County School District 001 (District) did not commit a prohibited practice under the version of the Industrial Relations Act (IRA) then in effect, Neb. Rev. Stat. §§ 48-801 to 48-838 (Reissue 2010). Local 226 argues that the District unilaterally changed its vacation accrual policy, declared the issue nonnegotiable, and failed to bargain on a mandatory subject of bargaining.

We conclude the District unilaterally changed its vacation accrual policy but presented Local 226 with opportunities to give input on the policy changes and request negotiations before implementation of the changes. Local 226 failed to take advantage of those opportunities. It negotiated and signed new

collective bargaining agreements (CBA's) for the school year in which the new vacation accrual policy would take effect without requesting negotiations on the new policy. In doing so, Local 226 waived its right to negotiate on the matter of vacation accrual. We affirm the order of the CIR.

## II. SCOPE OF REVIEW

[1] In reviewing an appeal from the CIR in a case involving wages and conditions of employment, an order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. *Employees United Labor Assn. v. Douglas Cty.*, 284 Neb. 121, 816 N.W.2d 721 (2012).

## III. FACTS

Local 226 is the duly certified exclusive bargaining agent for the District's office personnel, educational paraprofessionals, and operations division. For the 2010-11 and 2011-12 school years, Local 226 and the District entered into separate CBA's for each of those three bargaining units. The current dispute over vacation accrual arose while Local 226 and the District were negotiating the CBA's for the 2011-12 school year, but during the time the CBA's for the 2010-11 school year were still in effect.

For the past 20 years, article 9 of the relevant CBA's has set forth the amount of vacation to which each employee was entitled. But the CBA's have never "outlined the manner and method of accrual and distribution of the agreed upon amount of vacation." Rather, at all times relevant to this case, the distribution of vacation was governed by section 4.21 of the District's "Policies and Regulations." The entire policies and regulations were incorporated by reference into article 2 of the CBA's. Article 2 also provided that the District could make changes to the policies and regulations at any time.

The District has made changes to section 4.21 at least 10 times over the past 52 years, both with and without Local 226's approval.

When the District and Local 226 entered into the CBA's for the 2010-11 school year, section 4.21 of the policies and regulations provided that employees were granted their full vacation allotment for the year in a single lump sum on August 1, 2011—the start of the school year. If an employee terminated employment or transferred to a position in which he or she was not eligible for vacation, any unused vacation days would be paid out in the final paycheck. If a new employee was hired or an employee transferred to a vacation-eligible position after August 1, he or she would receive prorated vacation days based on the date of hire or transfer.

Both parties have stipulated that at their meetings on February 9 and March 2, 2011, the District advised Local 226 that the District was “going to make” changes to section 4.21. Under the proposed changes to section 4.21, employees would accrue vacation throughout the school year instead of being granted their vacation allotment in a single lump sum at the beginning of the school year.

On May 16, 2011, the Omaha Public Schools Board of Education adopted the amendments to section 4.21, to be effective August 1. Local 226 did not appear at the board of education meeting to oppose the changes.

On May 17, 2011, the members of Local 226 were notified of the changes adopted by the board of education. In response, Local 226 sent a letter to the District requesting that it “cease and desist from implementing [the vacation accrual] policy.” Local 226 characterized the District's action in implementing the new policy as a “unilateral change of a mandatory subject of bargaining[,] which is a prohibited practice.” It asked the District to “advise as to [the District's] intentions within the next seven (7) calendar days.”

In a reply letter, the District asserted that it “has the right to change its Policies and Regulations so long as those policies don't violate the terms of the [ CBA's]” and that the amendments to section 4.21 were within its authority under the CBA's and not in violation of the provisions of the CBA's addressing

vacation. The District closed by noting, “We remain open . . . to working with Local 226 to address any concerns about the practical application of the revised policy.”

Beginning in February 2011 and continuing throughout the summer, the District and Local 226 were engaged in substantive negotiations of the CBA’s for the 2011-12 school year. During those negotiations, Local 226 did not propose any changes to the new vacation accrual policy that was scheduled to take effect on August 1.

On September 13 and October 10 and 19, 2011, the District and Local 226 signed the CBA’s for the 2011-12 school year for the operations division, paraprofessionals, and office personnel, respectively. The CBA’s were effective retroactively to August 1, 2011.

In January 2012, following implementation of the new vacation accrual policy, Local 226 filed petitions with the CIR on behalf of each of the three bargaining groups. It alleged that the District had engaged in “a prohibited practice of bad-faith bargaining in violation of Nebraska Revised Statute §48-824(1) (Reissue 2004).” Local 226 asserted that the District “failed and refused to negotiate or agree to negotiate regarding the [v]acation [a]ccrual [p]olicy and said unilateral action on the part of the [District] constitutes a change in the terms and conditions of employment with respect to a mandatory subject of collective bargaining.” It prayed that the CIR order the District “to cease and desist from its continued unilateral actions” and to maintain the previous vacation accrual policy “until or unless [Local 226] has agreed to the same” or the CIR issued an order altering the obligations of the parties. The District filed answers generally denying that it had committed a prohibited practice.

The CIR held a consolidated trial on the petitions. The parties adduced evidence regarding whether past practices between the parties created an implied contractual term regarding the manner and method of vacation accrual, whether Local 226 had an obligation to initiate negotiations after learning of the new vacation accrual policy, and whether Local 226 consented to the new vacation accrual policy by entering into the CBA’s for the 2011-12 school year, among other things. Significantly,

the parties presented differing accounts of the level to which the District involved Local 226 in the development of the new vacation accrual policy.

The District adduced evidence that it notified Local 226 and the other unions that it was considering making changes to section 4.21 of the policies and regulations. Dr. Germaine Huber, chief negotiator for the board of education, testified that she “talked with all the unions” about the new vacation accrual policy. According to Huber, during those discussions, the unions expressed concerns about not having vacation early in the school year, in response to which the District incorporated into the new policy the option of applying for an advancement of up to 5 vacation days. As to Local 226, Huber did not specifically describe the District as having “negotiated” with Local 226 over the changes to section 4.21, but maintained that they “had discussions.”

Local 226 presented a differing account of the events leading to adoption of the new vacation accrual policy. Suzanne Anderson, president of Local 226, testified that at the February 9 and March 2, 2011, meetings, the District told Local 226 that the vacation accrual policy “was going to happen” and “was going to go through.” According to Anderson, Local 226 protested the proposed changes and told the District that it “wanted to negotiate [the new policy],” but the District “said it was not negotiable.” Anderson conceded that the District allowed Local 226 to provide feedback on the issue of advance vacation days, but asserted that advancement was the only issue about which it was given the opportunity to provide feedback. She said that Local 226 did not make any suggestions at the meetings other than voicing that Local 226 “wanted to negotiate [the new policy] because we did not want that.”

On December 6, 2012, the CIR entered an order finding that the District had not engaged in a prohibited practice. It first concluded that the District had “a duty to bargain over any changes to the vacation accrual policy” because vacation leave was a mandatory subject of bargaining under the IRA. The CIR then turned to the question whether the District had fulfilled its duty to bargain, noting that “the evidence as a

whole does not support the notion that [the District] was not willing to have discussions with [Local 226] about the vacation accrual policy.” Rather, the CIR found, based on the evidence, that the District had given Local 226 “sufficient notice” of the proposed change such that Local 226 had an obligation to “make a timely request to bargain.” It found the evidence demonstrated that Local 226 failed to negotiate to impasse on the matter. Therefore, the CIR found that Local 226 had failed to prove that the District committed a prohibited practice under § 48-824(1) and dismissed all three petitions.

Local 226 timely appeals, and the District cross-appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

#### IV. ASSIGNMENTS OF ERROR

Local 226 generally assigns that the CIR was clearly wrong and acted contrary to law in finding that the District did not commit a prohibited practice by unilaterally implementing changes to section 4.21 of the policies and regulations. More specifically, Local 226 assigns that the CIR was clearly wrong and acted contrary to law in finding that Local 226 had an obligation to bargain to impasse over the District’s unilateral change to a mandatory subject of bargaining.

On cross-appeal, the District assigns that the CIR erred in failing to rule that (1) the terms of the CBA’s clearly and unambiguously granted the District the right to unilaterally modify section 4.21, (2) the District has an established past practice of modifying section 4.21 during the term of the CBA’s, and (3) the District’s established practice of modifying section 4.21 formed an implied contract term.

#### V. ANALYSIS

##### 1. PROHIBITED PRACTICE

###### (a) Background

Local 226’s appeal raises one fundamental question: whether the District committed a prohibited practice under § 48-824(1) by changing section 4.21, and thereby adopting a new vacation accrual policy, without negotiating with Local 226. Section

48-824(1) provided that “[i]t is a prohibited practice for any employer, employee, employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.”

[2-6] The IRA requires parties to negotiate only mandatory subjects of bargaining. *Scottsbluff Police Off. Assn. v. City of Scottsbluff*, 282 Neb. 676, 805 N.W.2d 320 (2011). Mandatory subjects of bargaining include “the scale of wages, hours of labor, or conditions of employment.” *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, 114, 817 N.W.2d 250, 255 (2012) (quoting § 48-818). “[M]anagement prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining.” *Scottsbluff Police Off. Assn. v. City of Scottsbluff*, 282 Neb. at 683, 805 N.W.2d at 328. A matter which is of fundamental, basic, or essential concern to an employee’s financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. *Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area*, 203 Neb. 832, 281 N.W.2d 201 (1979). Vacation is a mandatory subject of bargaining. See, e.g., *El Paso Elec. Co. v. N.L.R.B.*, 681 F.3d 651 (5th Cir. 2012); *Tanforan Park Food Purveyors Council v. N. L. R. B.*, 656 F.2d 1358 (9th Cir. 1981); *Adams Potato Chips, Inc. v. N. L. R. B.*, 430 F.2d 90 (6th Cir. 1970). See, also, *FOP Lodge 41 v. County of Scotts Bluff*, 13 C.I.R. 270 (2000).

[7] Because of § 48-824(1),

an employer subject to the IRA may implement unilateral changes to mandatory subjects of bargaining only when three conditions have been met: (1) The parties have bargained to impasse, (2) the terms and conditions implemented were contained in a final offer, and (3) the implementation occurred before a petition regarding the year in dispute is filed with the CIR.

*Scottsbluff Police Off. Assn. v. City of Scottsbluff*, 282 Neb. at 686, 805 N.W.2d at 330. If any of these three conditions are not met, then the employer’s unilateral implementation of

changes in mandatory bargaining topics is a per se violation of the duty to bargain in good faith. *Id.*

With that background, we now turn to the facts and issues in the instant case.

(b) District's Obligation to  
Negotiate in Good Faith

We first note that the District acted within its authority under the CBA's to amend section 4.21 of the policies and regulations and thereby adopt a new vacation accrual policy. Article 2 of the CBA's for the 2010-11 school year provided:

Each and every provision of the *Policies and Regulations* incorporated by specific reference herein, and made a part of this Agreement, shall be binding upon both parties hereto, in their language as of the date hereof, throughout the term of this Agreement, notwithstanding that the School District may act to change *Policies and Regulations* after the effective date of this Agreement.

Under that language, the District had the authority to make changes to the policies and regulations while the CBA's for the 2010-11 school year were in effect, but such changes, although permissible, would not be binding upon Local 226 for the 2010-11 school year. Rather, the policies and regulations in effect when the parties entered into the CBA's would continue to bind the parties "in their language as of the date hereof, throughout the term of this Agreement." Thus, under the CBA's with Local 226, the District had the authority to make changes to the policies and regulations but could not enforce those changes against Local 226 until after July 31, 2011. The District acted pursuant to that authority when it proposed and adopted changes to section 4.21 of the policies and regulations for the 2011-12 school year. Both parties agree that the District did not implement the changes to section 4.21 until August 1, 2011—after the CBA's for the 2010-11 school year had expired.

However, despite acting within its powers under the CBA's, the District was still required by the IRA to negotiate regarding the new vacation accrual policy, because it related to a mandatory subject of bargaining. Therefore, under § 48-824(1), the

District was required to negotiate in good faith with Local 226 about the new vacation accrual policy.

The District and Local 226 agree that no formal negotiations on the new vacation accrual policy took place before the new policy was implemented on August 1, 2011. The parties also agree that the District was not permitted to unilaterally implement the new policy on the ground that they had negotiated to impasse, because the parties had not in fact negotiated to impasse. Accordingly, unless Local 226 waived its right to negotiate, the District had committed a prohibited practice and a per se violation of its duty to bargain in good faith by implementing the new vacation accrual policy without first engaging in negotiations with the union.

(c) Waiver by Local 226

(i) Preliminary Matters

Generally, the possibility of waiver can be considered only after we have determined that the dispute was not covered by the relevant collective bargaining agreement. See *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, 284 Neb. 109, 817 N.W.2d 250 (2012). In conducting such an inquiry, we examine whether the collective bargaining agreement “‘fully defines the parties’ rights’” as to the topic in issue. *Id.* at 117, 817 N.W.2d at 257.

In the instant case, the rights of the parties were not defined by the CBA’s. The implementation of the new vacation accrual policy was effective August 1, 2011. The CBA’s expired July 31, 2012. It is true that by law, the expired CBA’s would continue to govern the parties’ obligations to one another. See *Employees United Labor Assn. v. Douglas Cty.*, 284 Neb. 121, 816 N.W.2d 721 (2012). But the parties are governed by the expired CBA’s only to the extent that the conditions of employment previously set forth need to be maintained. See *id.* Because the alleged prohibited practice would have occurred after the CBA’s had expired, there were no agreements which would determine the parties’ rights regarding vacation accrual. It is thus appropriate to consider if Local 226 waived its right to bargain regarding the accrual of vacation. See *Douglas Cty. Health Ctr. Sec. Union v. Douglas Cty.*, *supra*.

*(ii) Finding of Waiver  
in CIR's Order*

On appeal, Local 226 does not directly address the question of waiver. Local 226 asserts that the CIR determined “Local 226 did not waive its right to bargain” and based its decision that the District did not commit a prohibited practice on Local 226’s failure to bargain to impasse. See brief for appellant at 14. At the end of its order, the CIR stated that “[t]he reasons given for [Local 226’s] failure to bargain to impasse . . . do not constitute a convincing basis for [Local 226’s] claim that [the District] committed a prohibited practice.” Based on that statement, Local 226 argues that it should not have been required to negotiate to impasse before filing petitions against the District. That focus on the CIR’s mention of negotiating to impasse is unfounded.

Considering the CIR’s order in its entirety, it is clear that the decision was based upon Local 226’s failure to request negotiations. In its order, the CIR stated that the District provided notice to Local 226 of the proposed changes to the vacation accrual policy, at which point Local 226 became obligated to request negotiations if it objected to the changes. Before reaching the point at which bargaining to impasse was an issue for either party, Local 226 had to request negotiations. The CIR found that Local 226 did not.

Once the CIR concluded that Local 226 failed to even request negotiations, any discussion of negotiating to impasse was extraneous to the CIR’s ultimate conclusion. Indeed, it was only in rebutting Local 226’s allegations why it did not request negotiations that the CIR addressed the matter of impasse. Implicit in the CIR’s order was that Local 226 waived its right to bargain on the issue of vacation accrual by failing to request negotiations. As this finding was the basis of the CIR’s decision that the District did not commit a prohibited practice, it is this finding of waiver that we review on appeal.

*(iii) Legal Requirements  
for Waiver*

[8,9] It is possible for employees or their representatives to waive the right to bargain on mandatory subjects of bargaining.

A clear and unmistakable waiver of a statutory right may be found in the express language of a collective bargaining agreement, or it may even be implied from the structure of an agreement and the parties' course of conduct. *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007). An employer bears the burden of establishing that a clear and unmistakable waiver of a statutory right in a collective bargaining agreement has occurred. *Id.* In the instant case, the District had to establish that Local 226 waived its right to bargain on the change in the vacation accrual policy.

Although there is little Nebraska case law discussing waiver of the right to bargain under the IRA, the federal courts have extensively discussed waiver under the National Labor Relations Act, 29 U.S.C. §§ 151 to 169 (2006) (NLRA). The same standard for waiver exists under the IRA and the NLRA. Compare *Hogelin v. City of Columbus*, *supra*, with *Intern. Broth. of Elec. Workers v. N.L.R.B.*, 706 F.3d 73 (2d Cir. 2013). And "decisions under the [NLRA] are helpful in interpreting the IRA, but are not binding." *Scottsbluff Police Off. Assn. v. City of Scottsbluff*, 282 Neb. 676, 681, 805 N.W.2d 320, 327 (2011).

The NLRA provides that a union can waive its right to bargain by failing to request bargaining or otherwise inform the employer that the union wishes to bargain. Shortly after the NLRA was enacted, the U.S. Supreme Court explained that an employer cannot be held liable when the employees have failed to act:

Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.

However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the

settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining . . . . The employer cannot, under the statute, be charged with refusal of that which is not proffered.

*Labor Board v. Columbian Co.*, 306 U.S. 292, 297-98, 59 S. Ct. 501, 83 L. Ed. 660 (1939).

Since the NLRA's enactment, many of the federal circuit courts have similarly recognized the possibility of a waiver by employees or their representatives of the right to bargain on mandatory subjects of bargaining. See, e.g., *Intern. Broth. of Elec. Workers v. N.L.R.B.*, *supra*; *N.L.R.B. v. Solutia, Inc.*, 699 F.3d 50 (1st Cir. 2012); *N.L.R.B. v. Seaport Printing & Ad Specialties*, 589 F.3d 812 (5th Cir. 2009); *Regal Cinemas, Inc. v. N.L.R.B.*, 317 F.3d 300 (D.C. Cir. 2003); *N.L.R.B. v. Oklahoma Fixture Co.*, 79 F.3d 1030 (10th Cir. 1996); *N.L.R.B. v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995); *Intermountain Rural Elec. Ass'n v. N.L.R.B.*, 984 F.2d 1562 (10th Cir. 1993); *N.L.R.B. v. Pinkston-Hollar Const. Services, Inc.*, 954 F.2d 306 (5th Cir. 1992); *N.L.R.B. v. Island Typographers, Inc.*, 705 F.2d 44 (2d Cir. 1983); *N. L. R. B. v. Alva Allen Industries, Inc.*, 369 F.2d 310 (8th Cir. 1966); *N. L. R. B. v. Rural Electric Company*, 296 F.2d 523 (10th Cir. 1961). Under that case law, "the duty of an employer to recognize and bargain collectively with a union as the collective bargaining representative of employees does not arise until after the union requests the employer to bargain." *N. L. R. B. v. Rural Electric Company*, 296 F.2d at 524. The employer must give the union notice that it intends to make changes to the conditions of employment. See, e.g., *Intern. Broth. of Elec. Workers v. N.L.R.B.*, *supra*; *N.L.R.B. v. Unbelievable, Inc.*, *supra*; *N.L.R.B. v. Island Typographers, Inc.*, *supra*. But once notice is given, it places an obligation upon the union to request bargaining so as not to waive the employees' right to bargain. See, e.g., *N.L.R.B. v. Solutia, Inc.*, *supra*; *N.L.R.B. v. Seaport Printing & Ad Specialties*, *supra*; *Regal Cinemas, Inc. v. N.L.R.B.*, *supra*; *N.L.R.B. v. Oklahoma Fixture Co.*, *supra*; *N.L.R.B. v. Unbelievable, Inc.*, *supra*; *Intermountain Rural*

*Elec. Ass'n v. N.L.R.B.*, *supra*; *N.L.R.B. v. Pinkston-Hollar Const. Services, Inc.*, *supra*; *N.L.R.B. v. Island Typographers, Inc.*, *supra*; *N. L. R. B. v. Alva Allen Industries, Inc.*, *supra*; *N. L. R. B. v. Rural Electric Company*, *supra*.

The union must act with "due diligence in requesting bargaining." *N.L.R.B. v. Pinkston-Hollar Const. Services, Inc.*, 954 F.2d at 310. Any less diligence amounts to a waiver by the bargaining representative of its right to bargain. *Id.* "[A] union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain." *N.L.R.B. v. Island Typographers, Inc.*, 705 F.2d at 51. However, "[a] union is 'not required to go through the motions of requesting bargaining[]' . . . if it is clear that an employer has made its decision and will not negotiate.'" *N.L.R.B. v. Solutia, Inc.*, 699 F.3d at 64 (alteration and ellipsis in original) (quoting *Regal Cinemas, Inc. v. N.L.R.B.*, *supra*).

[10] Under federal case law, as under Nebraska law, the burden of proving waiver rests on the employer:

To establish waiver of the right to bargain by union inaction, the employer must first show that the union had "clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change." . . . In addition, the employer must show that "the union failed to make a timely bargaining request before the change was implemented."

*N.L.R.B. v. Unbelievable, Inc.*, 71 F.3d at 1440-41 (citations omitted) (quoting *American Distributing Co., Inc. v. N.L.R.B.*, 715 F.2d 446 (9th Cir. 1983) (amended and superseded on denial of rehearing)). See, also, *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007). Nonetheless, it is important to remember that "[t]he negotiations of [an employer] must be measured in the light of surrounding circumstances, which include corresponding attempts at good faith negotiation by the Union." *N. L. R. B. v. Alva Allen Industries, Inc.*, 369 F.2d 310, 321 (8th Cir. 1966). As the Eighth Circuit has explained,

[a] union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table. . . . Nor is a union in a good position to charge an employer with bargaining in bad faith when the union itself has exhibited little, if any, real desire to reach a bona fide contract benefitting the members of the bargaining unit which it, by law, is required to represent.

*Id.* (citations omitted).

(iv) *Application to  
Present Appeal*

[11] In its order, the CIR concluded that Local 226 waived its right to bargain on the subject of vacation accrual, because Local 226 had not made a timely request to bargain. In doing so, the CIR followed its holding in *F.O.P., Lodge No. 21 v. City of Ralston, NE*, 12 C.I.R. 59, 66 (1994) (quoting *N. L. R. B. v. Alva Allen Industries, Inc.*, *supra*), in which the CIR adopted the following proposition:

Once a union has notice of a proposed change in a mandatory bargaining subject, it must make a timely request to bargain. "A union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table."

As noted above, this proposition is widely enforced throughout the federal courts. We agree with the CIR's adoption and continued enforcement of waiver in such a fashion.

Applying that standard of waiver to the facts in this case, we conclude that after receiving notice of the District's intended changes to the vacation accrual policy, Local 226's failure to make a timely request to bargain over the new vacation accrual policy changes constituted a waiver of Local 226's right to bargain on what would otherwise be a mandatory subject of bargaining. By showing that Local 226 received notice of the District's plans to implement a new vacation accrual policy but failed to request bargaining on the issue, the District proved a clear and unmistakable waiver by Local 226.

a. Notice to Local 226

The evidence adduced before the CIR clearly showed that the District provided sufficient notice to Local 226 that it intended to make changes to the vacation accrual policy. Huber testified that she notified Local 226 and the other unions that the board of education was considering making changes to section 4.21 of the policies and regulations. She explained that the provision of the new policy allowing employees to take up to 5 days advance vacation was explicitly added to address concerns raised by the unions when she talked with them.

Anderson, president of Local 226, agreed that the District gave her “advanced information about policies and regulations that [it was] considering making changes to,” including the changes to the vacation accrual policy in 2011. She also confirmed Huber’s testimony that the provision allowing for the advancement of vacation days was “a result of issues and concerns expressed by Local 226 to [the District] as [it was] contemplating changes to the policy.” In addition to providing advance notice that it was contemplating changes to section 4.21, the District held two meetings with Local 226 to discuss the changes. As noted above, the parties stipulated that on February 9 and March 2, 2011, the District met with Local 226 “to advise Local 226 of the changes [the District] was going to make” to the vacation accrual policy.

The evidence demonstrated that after learning of the proposed changes, Local 226 had multiple opportunities to request negotiations with the District. The District engaged Local 226 and the other unions in discussions about changes to the vacation accrual policy prior to adopting those changes. The District contacted the unions with advance information about the possible changes and held meetings in February and March 2011.

Anderson testified that at those meetings, the policy was presented as “nonnegotiable.” However, that testimony is contradicted by Anderson’s testimony that at the meetings, Local 226 was allowed to give “feedback” that was later incorporated into the new policy. As Anderson admitted, the provision

allowing for advance vacation days was added in response to the concerns of Local 226 and other unions.

On May 16, 2011, the board of education considered and adopted the new vacation accrual policy at a public meeting. Anderson testified that after the adoption of the new policy but before it took effect on August 1, the District talked with Local 226 about concerns it had with the policy. She stated that the District indicated it would work with Local 226 to address any concerns.

On May 17, 2011, the District distributed a letter to its employees informing them of the new vacation accrual policy adopted on May 16. Letters were also sent to employees on August 12 and 22 to advise them of their vacation allotment. The District's benefits specialist testified that all of the letters were submitted to Local 226 for review prior to being sent. All three letters also invited employees to contact the District's benefits specialist if they had any questions.

Local 226 had numerous opportunities to express its concerns about the new vacation accrual policy while negotiating with the District about the CBA's for the 2011-12 school year. Local 226 and the District met for negotiations no less than 15 times between the time when Local 226 was informed of the proposed changes and when the changes were implemented. Because there were many negotiations scheduled before implementation of the new vacation accrual policy, Local 226 had multiple opportunities to raise any concerns that it had and to add the new policy to the agenda for negotiations.

#### b. Request to Bargain

Local 226 did not request negotiations over the new vacation accrual policy. Rather, it consistently passed over the opportunity to do so. At the February and March 2011 meetings with the District, Local 226 did not raise any concerns other than those relating to vacation advancement. Local 226 did not protest the new policy at the board of education meeting on May 16 before it was adopted. And despite the District's indication that it would work with Local 226 to address its

concerns, Local 226 did not raise any specific concerns or request negotiations on the subject of vacation accrual.

On June 10, 2011, Local 226 did send a letter to the District, alleging that the new vacation accrual policy was a prohibited practice. Local 226 requested that the District “cease and desist from implementing [the vacation accrual] policy.” Local 226 asked the District to “advise as to [the District’s] intentions.” When the District responded on June 17, it stated, “We remain open . . . to working with Local 226 to address any concerns about the practical application of the revised policy.” Local 226 did not respond. Rather, Local 226 used its letter of June 10 as an excuse not to negotiate, because it had already expressed its objections.

Despite alleging on June 10, 2011, that the District had committed a prohibited practice, Local 226 did not file petitions with the CIR based on that prohibited practice until 7 months later, on January 27 and 30, 2012. It entered into negotiations with the District and ultimately signed new CBA’s for the 2011-12 school year well before filing this action. In the face of a full negotiation schedule and the prospect of adopting the CBA’s that would make the new policy binding on its members, Local 226 still did not raise the matter of vacation accrual. Indeed, Huber testified that Local 226 did not make any substantive proposals regarding vacation accrual during negotiations of the CBA’s for the 2011-12 school year. Anderson admitted that Local 226 “did not bring it to the table.”

At the conclusion of these scheduled negotiations, Local 226 did in fact enter into new CBA’s with the District. These CBA’s explicitly incorporated the entire policies and regulations, including the new vacation accrual policy. Thus, upon entering into these new CBA’s, the vacation accrual policy to which Local 226 objected was made binding upon Local 226 and its members.

Local 226 argues that it did request negotiations with the District and maintains that the District presented the vacation accrual policy as nonnegotiable. The CIR considered and rejected those claims. After mentioning Anderson’s testimony that Local 226 requested negotiations about the new vacation accrual policy, the CIR found that the District did not

commit a prohibited practice precisely because Local 226 failed to request negotiations. In so finding, the CIR explicitly rejected Local 226's contention that it requested negotiations and implicitly rejected the testimony upon which the claim was based. Furthermore, the CIR rejected much of Anderson's testimony attempting to explain why Local 226 did not negotiate. Significantly, the CIR found that Anderson's testimony that the District considered the vacation accrual policy non-negotiable was not supported by the other evidence in the case. Taken as a whole, the CIR's order concluded that the evidence supported the District's version of the facts over that of Local 226.

[12] This court will consider the fact that the CIR, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the CIR's judgment as to credibility. *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002). As an appellate court, we do not reweigh testimony. See *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013). The testimony before the CIR presented two versions of the facts surrounding the new vacation accrual policy. Per our scope of review, we give weight to the CIR's acceptance of one version of the facts over the other.

### c. Conclusion as to Waiver

We conclude Local 226 was put on notice of the proposed changes and consequently became obligated to request bargaining if it had any concerns about the new policy. Local 226 was given more than sufficient opportunity to express concerns about the new vacation accrual policy and negotiate regarding it. Those opportunities were available before the policy went into effect and before it became binding upon Local 226.

Considering the evidence as a whole and giving deference to the CIR's weighing of the evidence, we conclude that Local 226 did not request to bargain. Instead, the preponderance of the competent evidence before the CIR clearly demonstrated that Local 226 sat on the knowledge that the District planned to make changes to the vacation accrual policy and signed

new CBA's that made those changes binding on Local 226's members. Such evidence established a clear and unmistakable waiver of Local 226's right to negotiate.

By showing that Local 226 failed to request bargaining after being placed on notice of the proposed changes, the District proved clear and unmistakable waiver by Local 226 of the right to negotiate. Because Local 226 waived such right, the District did not commit a prohibited practice by failing to negotiate with Local 226 about the new vacation accrual policy. The CIR did not err in so finding.

## 2. CROSS-APPEAL

In the event that we did not affirm the CIR's finding that Local 226 failed to bargain, thereby precluding a ruling that the District committed a prohibited practice, the District's cross-appeal provided three alternate routes by which the CIR could have reached the same result. The District argues that the CIR erred in not finding against Local 226 for one of those three reasons and asks that we affirm the ultimate decision of the CIR.

[13] Having affirmed the CIR's decision, we do not reach the District's errors on cross-appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Holdsworth v. Greenwood Farmers Co-op*, ante p. 49, 835 N.W.2d 30 (2013).

## VI. CONCLUSION

For the aforementioned reasons, we affirm the CIR's order finding that the District did not commit a prohibited practice and dismissing Local 226's petitions.

AFFIRMED.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE  
OF THE NEBRASKA SUPREME COURT, RELATOR,  
v. ERIC W. KRUGER, RESPONDENT.  
839 N.W.2d 262

Filed November 1, 2013. No. S-13-108.

Original action. Judgment of public reprimand.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK,  
MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

### INTRODUCTION

Respondent, Eric W. Kruger, was admitted to the practice of law in the State of Nebraska on September 12, 1977. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska. On February 11, 2013, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges consisting of one count against respondent. In the one count, it was alleged that by his conduct, respondent had violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-504.1(a) (truthfulness in statements to others) and 3-508.4(a), (c), and (d) (misconduct).

On May 3, 2013, respondent filed his answer admitting to the formal charges. On May 23, a referee was appointed to recommend discipline, and on September 4, the referee's report was filed which recommended a public reprimand and supervised probation for a period of 18 months. On September 13, respondent filed exceptions to the referee's report.

On September 23, 2013, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he knowingly chose not to challenge or contest the truth of the matters set forth in the formal charges and waived all proceedings against him in connection therewith in exchange for a judgment of public reprimand and no supervised probation.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's request

for public reprimand is appropriate. The Counsel for Discipline agreed with respondent that “a term of probation is unnecessary in this case.”

Upon due consideration, we approve the conditional admission and order that respondent be publicly reprimanded.

### FACTS

The formal charges generally allege that respondent knowingly made false statements during a settlement negotiation. The underlying facts of this case can be found at *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 1631, 185 L. Ed. 2d 616 (2013).

The formal charges state that on December 20, 2007, Edward M. Smalley was injured when he was struck by a vehicle owned by Mark Morehead Construction, Inc. (Morehead), and driven by Jerome Speck. On behalf of Smalley, respondent filed suit against Speck and Morehead in February 2008.

It was determined that Smalley was eligible for Medicaid during his hospital stay, and in March 2008, the hospital submitted medical bills for Smalley in excess of \$400,000 to the Nebraska Department of Health and Human Services (DHHS) for payment under Medicaid. Pursuant to statutory regulations and DHHS’ provider agreement with the hospital, DHHS could fully resolve Smalley’s medical bills with a payment of approximately \$130,000. Emil Spicka, a medical claims investigator with DHHS, refused to pay Smalley’s hospital bills on the basis that “‘third party resources’” might be available, such as the liability insurance of Speck and Morehead. At the time DHHS denied payment of the medical bills, Smalley’s claims against Speck and Morehead had not been resolved.

Respondent received a settlement offer of \$800,000 from Speck and Morehead. According to the formal charges, respondent then specifically told Spicka that if DHHS would pay Smalley’s hospital bill, Smalley would reimburse Medicaid the full amount of its payment to the hospital of approximately \$130,000. Based upon the affirmative promise and assurance of payment from respondent, Spicka authorized the Medicaid

payment to the hospital, which effectively extinguished the hospital's claim against Smalley for medical services in excess of \$400,000.

Immediately after DHHS paid the hospital bill for Smalley, respondent amended the complaint in the pending case against Speck and Morehead to add DHHS as a defendant. According to the amended complaint, respondent acknowledged that he intentionally misled Spicka to believe that Smalley would agree to pay DHHS the full \$130,000 and that he made the false promise for the purpose of extinguishing the full hospital bill of over \$400,000 and with the express intention to thereafter challenge DHHS' claim to the full \$130,000. The formal charges allege that respondent knew his promise to Spicka was false when he made it.

The issue of DHHS' entitlement to the \$130,000 payment from Smalley was litigated, and ultimately on appeal, we determined that DHHS was entitled to full reimbursement of the \$130,000 Medicaid payment. See *Smalley v. Nebraska Dept. of Health & Human Servs.*, *supra*.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-504.1(a) and 3-508.4(a), (c), and (d).

### ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

(B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that

the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters set forth in the formal charges. We further determine that by his conduct, respondent violated professional conduct rules §§ 3-504.1(a) and 3-508.4(a), (c), and (d), as well as his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

### CONCLUSION

The conditional admission is accepted. Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF PUBLIC REPRIMAND.

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IN RE INTEREST OF SAMANTHA L. AND JASMINE L.,  
CHILDREN UNDER 18 YEARS OF AGE.  
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE,  
V. KELLY L., APPELLEE AND CROSS-APPELLANT,  
AND WILLIAM H., APPELLANT.  
839 N.W.2d 265

Filed November 1, 2013. No. S-13-264.

1. **Rules of the Supreme Court: Appeal and Error.** Headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2012). Under that rule, a party is required to set forth the

assignments of error in a separate section of the brief, with an appropriate heading, following the statement of the case and preceding the propositions of law, and to include in the assignments of error section a separate and concise statement of each error the party contends was made by the trial court.

2. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
3. **Rules of the Supreme Court: Appeal and Error.** Where a brief of a party fails to comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012), an appellate court may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error.
4. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Juvenile Courts: Adoption: Child Custody.** A juvenile court, except where an adjudicated child has been legally adopted, may always order a change in the juvenile's custody or care when the change is in the best interests of the juvenile.
6. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
7. **Trial: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.

Appeal from the Separate Juvenile Court of Douglas County:  
VERNON DANIELS, Judge. Affirmed.

Matthew P. Saathoff, of Saathoff Law Group, P.C., L.L.O.,  
for appellant.

Molly Adair-Pearson, of Adair-Pearson Law, for appellee  
Kelly L.

Donald W. Kleine, Douglas County Attorney, and Shakil A.  
Malik for appellee State of Nebraska.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK,  
MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

## INTRODUCTION

The biological parents of two children in the care and custody of the Nebraska Department of Health and Human Services (DHHS) each filed a notice of appeal from an order of the separate juvenile court of Douglas County. The order found

that DHHS was no longer required to supply reasonable efforts in support of reunification and that the primary permanency objectives for the children should be changed from reunification. Both parents failed to include in their respective briefs on appeal a separate section assigning error in the juvenile court's order. We therefore review the court's order for plain error. Finding none, we affirm.

### BACKGROUND

Kelly L. and William H. are the biological parents of Jasmine L. and Samantha L. The separate juvenile court of Douglas County placed Jasmine and Samantha in the temporary care and custody of DHHS on October 12, 2010, after DHHS received information that Kelly and William had engaged in acts of domestic violence in Jasmine's and Samantha's presence on multiple occasions.

An adjudication hearing was conducted by the juvenile court on January 5, 2011. Jasmine and Samantha had remained in the custody of DHHS up until that time. Upon completion of the hearing, the court entered an order providing that Kelly and William admitted or pled no contest to various allegations made by the State. Kelly admitted that she had failed to provide Jasmine and Samantha with proper parental care, support, and/or supervision, and pled no contest to the State's allegations that she and William had engaged in domestic violence in front of the children and that the children were at risk for harm. William admitted that his use of alcohol and/or controlled substances placed the children at risk for harm, and pled no contest to the State's allegations that he and Kelly had engaged in acts of domestic violence in front of the children and that the children were at risk for harm. Based upon Kelly's and William's pleas and admissions, the court found that it was in the best interests, safety, and welfare of Jasmine and Samantha to remain in the temporary care and custody of DHHS.

The juvenile court's order also set forth requirements for Kelly and William to complete for reunification. These requirements included, in relevant part, to (1) obtain and maintain safe, stable, and adequate housing; (2) obtain and maintain a

legal, stable source of income; (3) abstain from the consumption of alcohol and the use/possession of all controlled substances, unless prescribed by a physician; (4) submit to future random drug testing within 4 hours of a request by the case manager; and (5) participate in individual therapy to address issues relating to domestic violence.

Jasmine and Samantha's case then came before the juvenile court on several continued disposition hearings throughout 2011 and 2012. DHHS was required to provide Kelly and William with copies of reports that it planned to use at the hearings 3 days in advance of the hearing dates. However, three hearings during this period were continued because DHHS failed to do so. Because DHHS caused the hearings to be continued, the juvenile court assessed fees for preparation and attendance at the hearings against DHHS. DHHS appealed the fees award, and we disposed of the appeal in *In re Interest of Samantha L. & Jasmine L.*<sup>1</sup>

On February 15, 2012, Kelly and William moved the juvenile court for an order to toll the statutory ground for termination of parental rights provided by Neb. Rev. Stat. § 43-292(7) (Cum. Supp. 2012). Section 43-292(7) provides that parental rights may be terminated when a juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months. In support of their motion to toll, Kelly and William alleged that DHHS had caused three hearings to be continued by failing to provide them with copies of reports DHHS planned to use at the hearings. They further alleged that their contact with the caseworkers had been intermittent from approximately February 2011 to January 2012. Kelly and William ultimately claimed that these failures had limited their ability to comply with the court's orders. At the time the motion was filed, Jasmine and Samantha had been in the care and custody of DHHS for 16 months.

In response to Kelly and William's motion to toll, the parties entered into a stipulation providing that DHHS had failed to provide Kelly and William with reasonable efforts in support

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<sup>1</sup> *In re Interest of Samantha L. & Jasmine L.*, 284 Neb. 856, 824 N.W.2d 691 (2012).

of reunification from February 28, 2011, to February 29, 2012. The stipulation further requested that the juvenile court toll the statutory time period of § 43-292(7) from February 28, 2011, to February 29, 2012. The court did so in an order dated August 24, 2012.

Jasmine and Samantha's case then came before the juvenile court for an evidentiary and review and permanency planning hearing on February 11, 2013. At that time, Jasmine and Samantha had been in out-of-home placement for nearly 28 months. Their primary permanency objectives during that time had been reunification.

At the hearing, the State offered several exhibits to the juvenile court without objection. These exhibits included reports from the Nebraska Foster Care Review Office, a guardian ad litem report, a case plan and court report from DHHS, and correspondence documenting the progress of Kelly's and William's drug testing.

The exhibits made clear that both Kelly and William had demonstrated a continued disregard for the juvenile court's requirements for reunification during the nearly 28-month period that Jasmine and Samantha had been in the care and custody of DHHS. The exhibits showed that both Kelly and William had been evicted from their residences, that William had been terminated from his employment, that neither Kelly nor William was in compliance with urinalysis requests or participating in therapy, and that William had been discharged from his domestic violence program because he had missed more than the permitted number of classes.

The reports from the Nebraska Foster Care Review Office and the guardian ad litem report recommended that the primary permanency objectives for the children be changed from reunification and that reasonable efforts in support of reunification no longer be required. At the hearing, the author of the case plan from DHHS also made an oral amendment to the plan, recommending that the court adopt a primary permanency objective of adoption for Samantha.

In an order dated February 26, 2013, the juvenile court found that no further reasonable efforts were required in support of reunification, that the primary permanency objective

for Jasmine was to be independent living, and that the primary permanency objective for Samantha was to be guardianship with a concurrent plan of adoption.

William filed a timely notice of appeal. Kelly filed a second notice of appeal. Under our rules, she was considered an appellee<sup>2</sup> and was vested with the right to cross-appeal.<sup>3</sup>

### ASSIGNMENTS OF ERROR

[1] Both Kelly and William failed to include in their respective briefs on appeal a separate section assigning error in the juvenile court's February 26, 2013, order. We have emphasized that headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2012).<sup>4</sup> Under that rule, a party is required to set forth the assignments of error in a separate section of the brief, with an appropriate heading, following the statement of the case and preceding the propositions of law, and to include in the assignments of error section a separate and concise statement of each error the party contends was made by the trial court.<sup>5</sup> We again enforce these requirements.

### STANDARD OF REVIEW

[2-4] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.<sup>6</sup> However, where a brief of a party fails to comply with the mandate of § 2-109(D)(1)(e), we may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error.<sup>7</sup> Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.<sup>8</sup>

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<sup>2</sup> See Neb. Ct. R. App. P. § 2-101(C) (rev. 2010).

<sup>3</sup> See § 2-101(E).

<sup>4</sup> See *In re Interest of Jamya M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

<sup>5</sup> See *id.*

<sup>6</sup> *Id.*

<sup>7</sup> See *id.*

<sup>8</sup> *Id.*

### ANALYSIS

The juvenile court's February 26, 2013, order found that reasonable efforts in support of reunification were no longer required, that the primary permanency objective for Jasmine was to be independent living, and that the primary permanency objective for Samantha was to be guardianship with a concurrent plan of adoption. Because both Kelly and William failed to include a separate section assigning error in their briefs on appeal, we will review each of the above findings for plain error. We begin with the court's finding that reasonable efforts in support of reunification were no longer required.

### REASONABLE EFFORTS

The juvenile court's February 26, 2013, order found that reasonable efforts in support of reunification were no longer required. We do not find this conclusion to be plain error. From the outset, we acknowledge that the parties entered into a stipulation providing that reasonable efforts were not provided in support of reunification from February 28, 2011, to February 29, 2012. However, notwithstanding the stipulated time period, the evidence shows a clear pattern of disregard by Kelly and William for the services provided to them by DHHS in support of reunification. Due to Kelly's and William's continued disregard for these services, the court did not commit plain error in finding that reasonable efforts were no longer required.

The exhibits offered to the juvenile court at the February 11, 2013, hearing demonstrated that Kelly and William continually ignored the services provided to them by DHHS to fulfill the juvenile court's requirements for reunification. The case plan authored by DHHS stated that Kelly and William were not participating in individual therapy, couples counseling, family therapy, or Alcoholics Anonymous or drug/alcohol screening. The case plan also claimed that Kelly and William had "made themselves unavailable to services by not answering their phones or the door to their home."

The guardian ad litem report similarly established Kelly's and William's unwillingness to utilize the services provided

by DHHS. The report stated that “[a]ll resources necessary for the parents to comply with the orders of the court have been repeatedly made available to the parents and they continue to refuse services.” The report then recommended that DHHS no longer be required to offer services or provide reasonable efforts to assist Kelly and William in their compliance with the court’s order.

The correspondence documenting the progress of Kelly’s and William’s drug screening also demonstrated a continued lack of effort by Kelly and William to participate in the drug-screening services provided by DHHS. A January 21, 2013, letter from Kelly’s drug-testing provider stated that Kelly was to arrange to come to drug testing weekly, but tested only once and then missed all other drug tests. A January 30, 2013, e-mail from William’s drug-testing provider stated that William was being discharged from testing services for failing to call in to determine if he needed to test. The e-mail documented dozens of unsuccessful attempts by the provider to contact William to set up appointments for drug testing during 2011 and 2012.

The reports from the Nebraska Foster Care Review Office outlined barriers to reunification that similarly established Kelly’s and William’s unwillingness to utilize the services provided to them. These barriers included (1) lack of progress toward reunification, (2) noncompliance by both parents with urinalysis requests or participation in therapy, (3) lack of participation by both parents in outpatient substance abuse treatment, and (4) noncompletion by both parents of a domestic violence program.

The exhibits offered to the juvenile court established that Kelly and William continually failed to utilize the services provided by DHHS in support of reunification during the nearly 28 months that Jasmine and Samantha were in the care and custody of DHHS. Based upon the substantial evidence before the court of Kelly’s and William’s unwillingness to utilize these services, we find that the court did not commit plain error in no longer requiring DHHS to provide reasonable efforts in support of reunification.

## PRIMARY PERMANENCY OBJECTIVES

The juvenile court's February 26, 2013, order changed Jasmine's and Samantha's primary permanency objectives from reunification to independent living for Jasmine and guardianship with a concurrent plan of adoption for Samantha. We find no plain error in the court's modification of Jasmine's and Samantha's primary permanency objectives.

[5] A juvenile court, except where an adjudicated child has been legally adopted, may always order a change in the juvenile's custody or care when the change is in the best interests of the juvenile.<sup>9</sup> Here, the evidence before the juvenile court at the February 11, 2013, hearing adequately demonstrated that it was in Jasmine's and Samantha's best interests to modify their primary permanency objectives.

The evidence before the juvenile court showed that during the nearly 28 months that Jasmine and Samantha were in the care and custody of DHHS, Kelly and William had failed to make any significant progress toward reunification. The court report and case plan from DHHS stated that Kelly and William had each been evicted from their respective homes, that William was unemployed, and that there was continued evidence of alcohol abuse on the part of both Kelly and William. The court report further stated that Kelly's and William's lack of progress had caused the case to be drawn out longer than necessary and that the case's length was affecting Jasmine and Samantha.

The juvenile court also received several recommendations at the February 11, 2013, hearing that Jasmine's and Samantha's primary permanency objectives be changed from reunification. The reports from the Nebraska Foster Care Review Office recommended a permanency objective of adoption. The guardian ad litem report recommended a permanency objective of independent living for Jasmine and guardianship or adoption for Samantha. At the hearing, the author of the case plan from DHHS also made an oral amendment to the case plan that Samantha's permanency objective be changed to adoption.

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<sup>9</sup> *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

[6,7] Although William's counsel asserted at oral argument that Kelly and William were ambushed by the oral amendment to the case plan recommending that Jasmine's and Samantha's primary permanency objectives be changed from reunification, they failed to take any action to address their surprise before the juvenile court. Neither Kelly nor William objected to the oral recommendation or moved the court for a continuance once it was made. We have previously stated that a litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.<sup>10</sup> One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.<sup>11</sup> We apply that principle now in rejecting William's argument that the oral recommendation was an unfair surprise.

The evidence before the juvenile court established that it was in Jasmine's and Samantha's best interests to modify their primary permanency objectives from reunification. The evidence demonstrated that the case's length was affecting Jasmine and Samantha and that Kelly and William were unlikely to fulfill the court's requirements for reunification in the foreseeable future. The court also received multiple recommendations that Jasmine's and Samantha's permanency objectives be changed. We conclude that the court did not commit plain error in modifying Jasmine's and Samantha's primary permanency objectives in its February 26, 2013, order.

### CONCLUSION

Because both Kelly and William failed to comply with § 2-109(D)(1) regarding assignments of error, our review is limited to an examination of the record for plain error. The evidence before the court at the February 11, 2013, permanency planning hearing demonstrated that Kelly and William had repeatedly disregarded the services provided by DHHS in support of reunification. The evidence further established that modification of Jasmine's and Samantha's permanency objectives was in their best interests. We therefore find no

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<sup>10</sup> *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

<sup>11</sup> *Id.*

plain error in the juvenile court's February 26 order finding that reasonable efforts in support of reunification were no longer required, that the primary permanency objective for Jasmine was to be independent living, and that the primary permanency objective for Samantha was to be guardianship with a concurrent plan of adoption. Accordingly, we affirm the court's order.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, v.  
KAYLENE M. RIEGER, APPELLANT.  
839 N.W.2d 282

Filed November 1, 2013. No. S-13-456.

1. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
2. **Sentences: Probation and Parole.** It is within the discretion of the trial court whether to impose probation or incarceration.
3. \_\_\_\_: \_\_\_\_\_. When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
4. \_\_\_\_: \_\_\_\_\_. Whether a condition of probation imposed by the sentencing court is authorized by statute is a question of law.
5. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

Appeal from the District Court for Sarpy County, MAX KELCH, Judge, on appeal thereto from the County Court for Sarpy County, ROBERT C. WESTER, Judge. Sentence vacated in part, and cause remanded with directions.

Liam K. Meehan, of Schirber & Wagner, L.L.P., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Kaylene M. Rieger entered a guilty plea to one count of false reporting. She was sentenced by the county court for Sarpy County to probation for 18 months. As a condition of probation, she was directed to have no contact with her husband without the court's permission. The district court affirmed the sentence, and Rieger then perfected this timely appeal. We conclude that the broad prohibition on Rieger's contact with her husband is an unreasonable infringement upon Rieger's fundamental rights arising from marriage and an abuse of sentencing discretion. We therefore remand for resentencing.

### BACKGROUND

Rieger and Gavin Vreeland were married on August 25, 2012. At the time of the marriage, Rieger had two children from previous relationships. In September 2012, police received a report that her 5-year-old son had bruises on his lower back. Rieger told officers that she had caused the bruising when she spanked the child. However, police officers learned that the child told his grandmother that Vreeland had spanked him and had caused the injuries. The child told police officers that it was mostly Vreeland who spanked him and that Vreeland spanked hard enough to make him cry. The child appeared confused as to whether his mother told him to blame the injuries on Vreeland or herself. Officers talked to Rieger again, and she continued to accept responsibility for spanking the child, but officers later spoke with Vreeland, who admitted to causing the injuries.

Rieger was charged with one count of false reporting, a Class I misdemeanor,<sup>1</sup> and one count of tampering with a witness, a Class IV felony.<sup>2</sup> She entered a guilty plea to the false

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<sup>1</sup> Neb. Rev. Stat. § 28-907 (Reissue 2008).

<sup>2</sup> Neb. Rev. Stat. § 28-919 (Reissue 2008).

reporting charge, and the other charge was dismissed by the State. At the plea hearing, the court inquired whether there was any pending juvenile proceeding, and Rieger responded that there was not. Her counsel added that it was his understanding that the Department of Health and Human Services (DHHS) had found the “abuse allegations” to be “unfounded.” The court ordered a presentence investigation and scheduled a sentencing hearing.

According to the presentence investigation report (PSR), Rieger had no prior record other than traffic offenses. The PSR indicated that Rieger and Vreeland were currently married and that he was a “co-defendant in this present offense,” but the PSR did not disclose the status or disposition of any charges against him. The report disclosed that Rieger was disabled and stated that she had been diagnosed with posttraumatic stress disorder, chronic migraines, depression, hypertension, a stroke, and a brain tumor. It noted that Vreeland was unemployed. The probation officer made no sentencing recommendation, but included several recommended conditions if the court decided to place Rieger on probation. One of these recommendations was that she “avoid social contact with persons having criminal records,” but the report made no specific reference to future contact with Vreeland.

At the sentencing hearing, Rieger stated that she and Vreeland were still living in the same home. She stated that Vreeland had been around her son since he was less than 1 year old and that she had never “seen [Vreeland] do anything like this” previously. The prosecutor noted that according to the PSR, Vreeland “admitted to spanking the kids in the past and indicated that [Rieger] knew that.” The court again inquired whether Rieger’s children were involved in juvenile proceedings. Rieger’s counsel responded: “No. The DHHS found that these allegations were unfounded, kept them in the home, and then there are still criminal matters proceeding. I believe . . . Vreeland had a child abuse charge against him and she had the false reporting charge.” Later in the hearing, the prosecutor advised the court that Vreeland had entered a guilty plea to “child abuse” and Rieger stated that he was awaiting sentencing.

The county court told Rieger she could be placed on probation if she agreed to keep Vreeland out of the house while she was on probation or she could go to jail for 15 days, in which case, she would not receive some of her prescription medications. After inquiring about the failure of Rieger's relationships with the fathers of her children, the court stated: "So you pick losers. . . . And . . . my guess is that's related to you feel so bad about yourself that . . . you'll put up with someone just so that they'll be there." The court further observed that Rieger had "an instinctual way of finding a guy that's kind of at the bottom of the barrel that will put up with you and you put up with him, and that's the way it is."

The court placed Rieger on probation for 18 months with conditions, including completion of a psychological evaluation, weekly individual counseling, and weekly attendance at a women's group. Rieger was also ordered to have "No contact with . . . [V]reeland" without permission of the court. The court said it would permit contact between Rieger and Vreeland only if there was "some kind of intense therapeutic deal."

Rieger appealed to the district court, which affirmed the sentence. The district court found the no-contact condition was reasonable because both the factual basis for the plea and the PSR left unresolved the question of whether Vreeland had committed child abuse. The court reasoned that the protection of a young child superseded any relationship between Rieger and Vreeland. Rieger filed this timely appeal. We moved the appeal to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.<sup>3</sup> It was submitted without oral argument pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008).

### ASSIGNMENTS OF ERROR

Rieger assigns, restated and summarized, that the condition of probation that she have no contact with Vreeland was an abuse of discretion because it violated her fundamental rights inherent in the marital relationship and was not reasonably

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<sup>3</sup> See, Neb. Rev. Stat. § 24-1106(3) (Reissue 2008); Neb. Ct. R. App. P. § 2-102(C) (rev. 2012).

related to her rehabilitation. In addition, she contends that the 18-month period of probation is excessive in light of her minimal prior record.

### STANDARD OF REVIEW

[1,2] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.<sup>4</sup> It is within the discretion of the trial court whether to impose probation or incarceration.<sup>5</sup>

### ANALYSIS

#### NO-CONTACT CONDITION

[3,4] When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.<sup>6</sup> Whether a condition of probation imposed by the sentencing court is authorized by statute is a question of law.<sup>7</sup> The applicable statute provides that “[w]hen a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life.”<sup>8</sup> These include requiring the offender to “meet his or her family responsibilities,”<sup>9</sup> to “refrain from frequenting unlawful or disreputable places or consorting with disreputable persons,”<sup>10</sup> and to “satisfy any other conditions reasonably related to the rehabilitation of the offender.”<sup>11</sup> We construe these provisions to authorize a no-contact condition of

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<sup>4</sup> *State v. Dixon*, ante p. 334, 837 N.W.2d 496 (2013).

<sup>5</sup> *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

<sup>6</sup> *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007); *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000).

<sup>7</sup> *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010); *State v. Lobato*, supra note 6.

<sup>8</sup> Neb. Rev. Stat. § 29-2262(1) (Cum. Supp. 2012).

<sup>9</sup> § 29-2262(2)(c).

<sup>10</sup> § 29-2262(2)(h).

<sup>11</sup> § 29-2262(2)(r).

probation when it is reasonable and necessary to the rehabilitative goals of probation.

From our review of the record, it appears that the sentencing judge imposed the no-contact condition as a means of requiring Rieger to fulfill her parental responsibility to protect her children from potential future harm. Rieger contends that the no-contact condition must be subjected to heightened scrutiny because it affects the marital relationship, which the U.S. Supreme Court has described as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>12</sup> Although we have not previously addressed this precise issue, Rieger’s position is consistent with the analytical approach taken by other jurisdictions.

For example, in *Dawson v. State*,<sup>13</sup> an Alaska appellate court invalidated a condition of probation which precluded contact between the defendant and his wife, with whom he had been involved in selling drugs. Alaska law required conditions of probation to be reasonably related to the rehabilitation of the offender and the protection of the public, and subjected conditions which restricted constitutional rights to special scrutiny to determine whether the restriction served those goals. The Alaska court found that the spousal no-contact condition “plainly implicate[d] the constitutional rights of privacy, liberty and freedom of association.”<sup>14</sup> It reasoned that while such restrictions could be justified by case-specific circumstances, “to avoid unnecessary intrusion on marital privacy, it [is] appropriate to tailor a close fit between the scope of the order restricting marital association and the specific needs of the case at hand.”<sup>15</sup> The court ultimately vacated the no-contact provision upon determining it was not specifically tailored to the circumstances and therefore was unduly restrictive of liberty. However, it stated that the trial court, on remand, could

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<sup>12</sup> *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), quoting *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 2d 1655 (1942).

<sup>13</sup> *Dawson v. State*, 894 P.2d 672 (Alaska App. 1995).

<sup>14</sup> *Id.* at 680.

<sup>15</sup> *Id.* at 681.

in its discretion “consider the appropriateness of a more limited special condition.”<sup>16</sup>

Applying similar reasoning, the Supreme Court of Oregon in *State v. Martin*<sup>17</sup> set aside a condition of probation which barred contact between a woman convicted of forgery and her husband, who was also involved in the crime. The trial court reasoned that the no-contact condition was justified because the wife’s counsel had argued at sentencing that the husband was largely to blame for her crimes and, thus, barring contact was necessary for rehabilitation. The Oregon Supreme Court stated that this “might have been sufficient to support a condition of probation that defendant not associate with her former partner in crime, had that person not been her spouse.”<sup>18</sup> But the court reasoned that “where fundamental rights are involved the sentencing court has less discretion to impose conditions in conflict therewith.”<sup>19</sup> The court stated that the sentencing court should have made more detailed factual findings regarding any potential harm which could result from marital contact and should consider whether “interference with marital rights less than complete separation would serve to protect society’s interests.”<sup>20</sup>

Also instructive is *State v. Ancira*.<sup>21</sup> As a condition of probation, the defendant was required to have no contact with his wife or his two minor children for 5 years. The sentencing court stated that the order was necessary to protect the children, who had witnessed an incident of domestic violence between their parents. The appellate court reasoned that restriction of the fundamental right of a parent to have contact with his children could only be justified if reasonably necessary to prevent harm to the children and that the total prohibition of any form of contact had not been shown to be reasonably necessary to

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<sup>16</sup> *Id.*

<sup>17</sup> *State v. Martin*, 282 Or. 583, 580 P.2d 536 (1978).

<sup>18</sup> *Id.* at 589, 580 P.2d at 539.

<sup>19</sup> *Id.* at 589, 580 P.2d at 540.

<sup>20</sup> *Id.*

<sup>21</sup> *State v. Ancira*, 107 Wash. App. 650, 27 P.3d 1246 (2001).

protect the children. The court also noted that while some limitations on the defendant's visitation rights might be warranted, the family and juvenile courts were better equipped to make such determinations. It therefore struck the no-contact provision involving the defendant's children.

Even courts which have upheld restrictions on contact with spouses or children as a condition of probation recognize that such restrictions must be subjected to greater scrutiny than no-contact provisions involving unrelated persons. For example, in *People v. Jungers*,<sup>22</sup> a California court upheld a condition of probation which prohibited a defendant convicted of a felony involving domestic violence from initiating contact with the victim, his wife. Noting that restrictions on constitutional rights must be "carefully tailored and 'reasonably related to the compelling state interest' in reforming and rehabilitating the defendant,"<sup>23</sup> the court reasoned that the condition "did not impose a complete ban on association or marital privacy, but only a narrowly tailored condition consistent with [the defendant's] rehabilitation and the safety of the victim."<sup>24</sup> The court noted that the condition did not preclude the defendant from participating in marital contacts, but only from initiating such contacts, and was therefore a reasonable restriction which did not interfere with the marital relationship to an impermissible degree.

Likewise, in *Commonwealth v. Lapointe*,<sup>25</sup> the Supreme Judicial Court of Massachusetts upheld a condition of probation which prohibited the defendant, who had been convicted of sexually assaulting his minor daughter, from residing in a home with his victim or other minor children. Recognizing that parental rights were constitutionally protected, the court reasoned that "[i]n cases where a condition touches on constitutional rights, the goals of probation 'are best served if the conditions of probation are tailored to address the particular

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<sup>22</sup> *People v. Jungers*, 127 Cal. App. 4th 698, 25 Cal. Rptr. 3d 873 (2005).

<sup>23</sup> *Id.* at 704, 25 Cal. Rptr. 3d at 878.

<sup>24</sup> *Id.* at 705, 25 Cal. Rptr. 3d at 879.

<sup>25</sup> *Commonwealth v. Lapointe*, 435 Mass. 455, 759 N.E.2d 294 (2001).

characteristics of the defendant and the crime.’”<sup>26</sup> The court concluded that the residency restriction was reasonably tailored to the circumstances because the defendant had targeted minors residing in his home and had used the family relationship to perpetrate his abuse.

Although it did not involve a spousal no-contact provision, this court’s opinion in *State v. Morgan*<sup>27</sup> provides support for Rieger’s argument that a no-contact provision which infringes upon a fundamental right should be subjected to a higher degree of scrutiny. At issue in *Morgan* was a condition of probation which required the defendant, who had been convicted of selling marijuana, to submit to a search of his person or property at any time during the probationary period, without probable cause. The defendant challenged the search condition, alleging that it violated his Fourth Amendment rights. This court stated that while “such conditions should be sparingly imposed and should be reasonably related to the offense for which the defendant was convicted,”<sup>28</sup> they are valid and constitutional “to the extent that they contribute to the rehabilitation process and are done in a reasonable manner.”<sup>29</sup> We conclude that the same principles should apply to a condition of probation which prohibits or restricts a probationer’s contact with a spouse and that such a condition should be narrowly tailored and reasonably related to the rehabilitative process.

In considering whether a probation condition is narrowly tailored and reasonably related to the goal of rehabilitation, we consider both its purpose and scope. There is no indication in the record that the no-contact condition was necessary to protect Rieger from Vreeland. Rather, as we have noted, it appears that the condition was designed to protect Rieger’s children from Vreeland. But the need for such protection is unclear from the record. In response to questions from the court prior to entry of the order of probation, Rieger’s counsel

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<sup>26</sup> *Id.* at 459, 759 N.W.2d at 298.

<sup>27</sup> *State v. Morgan*, 206 Neb. 818, 295 N.W.2d 285 (1980).

<sup>28</sup> *Id.* at 825, 295 N.W.2d at 288.

<sup>29</sup> *Id.* at 827, 295 N.W.2d at 289.

twice indicated that the State had declined to institute juvenile abuse and neglect proceedings. Although the prosecutor advised the court that Vreeland had entered a guilty plea to a “child abuse” charge, the record does not disclose whether this was a misdemeanor charge of negligent child abuse or a felony charge of knowing and intentional abuse.<sup>30</sup> Nor does the record disclose whether Vreeland had any prior record of child abuse or assaultive behavior. And there is no evidence that Vreeland was complicit in Rieger’s false reporting. When police questioned Vreeland after receiving Rieger’s report, he readily admitted that he had administered the spanking which resulted in the bruising.

But even assuming that some protective measure was required, the broad no-contact provision included in the order of probation is not narrowly tailored to that purpose. It forbids *any* form of contact between Rieger and Vreeland without court permission, which the court indicated it would only consider in connection with “some kind of intense therapeutic deal.” We cannot discern from this record any reason that a less restrictive condition, such as one permitting supervised contact in the presence of the children, unsupervised contact without the children present, or telephone or e-mail communication, would not have been sufficient to protect Rieger’s children.

[5] As noted, we review criminal sentences for abuse of discretion. An abuse of discretion occurs when a trial court’s decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.<sup>31</sup> Because the no-contact condition at issue here affects Rieger’s fundamental rights attendant to her marriage and the record does not establish that the prohibition of marital contact was narrowly tailored and reasonably necessary to protect Rieger’s children or serve any rehabilitative purpose, we conclude that the inclusion of this condition in the order

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<sup>30</sup> See Neb. Rev. Stat. § 28-707 (Cum. Supp. 2012).

<sup>31</sup> *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013); *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

of probation was an abuse of discretion. This error requires that we remand the cause for resentencing to permit the county court either to remove the no-contact condition or to tailor it more narrowly to the factual circumstances of the case and the rehabilitative goals sought to be achieved.<sup>32</sup>

#### LENGTH OF PROBATION

Rieger also contends in this appeal that the 18-month term of her probation was excessive. The maximum term of probation upon conviction for a first offense misdemeanor is 2 years.<sup>33</sup> Thus, an 18-month term of probation is within statutory limits and may be disturbed on appeal only for an abuse of discretion.<sup>34</sup>

We find none. Rieger's offense was a Class I misdemeanor, the most serious of misdemeanor offenses, which carries a maximum sentence of 1 year's imprisonment and a fine of \$1,000.<sup>35</sup> The conditions of probation included counseling and other rehabilitative measures. We discern no abuse of discretion in the county court's determination that 18 months was an appropriate period in which to accomplish the rehabilitative goals of probation. The fact that the term of probation was longer than the maximum term of imprisonment for the offense is of no consequence, because § 29-2263(1) specifically authorizes a maximum probation term of 2 years for persons convicted of first-offense misdemeanors.

#### CONCLUSION

As we have noted, the error with respect to the spousal no-contact condition requires that we remand the cause for resentencing to permit the county court either to remove the condition or to tailor it more narrowly to the factual circumstances of the case and the rehabilitative goals sought to be achieved, while providing any necessary protection to the

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<sup>32</sup> See, *State v. Salyers*, 239 Neb. 1002, 480 N.W.2d 173 (1992); *Dawson v. State*, *supra* note 13.

<sup>33</sup> See Neb. Rev. Stat. § 29-2263(1) (Reissue 2008).

<sup>34</sup> See *State v. Dixon*, *supra* note 4.

<sup>35</sup> See Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 2012) and § 28-907.

minor children. We therefore vacate that portion of the sentence of probation which prohibits Rieger from having any contact with Vreeland and remand the cause to the district court with directions to remand it to the county court with instructions to resentence Rieger in conformity with this opinion. The sentence is affirmed in all other respects.

SENTENCE VACATED IN PART, AND CAUSE  
REMANDED WITH DIRECTIONS.

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KENNETH C., APPELLANT, v.  
LACIE H., APPELLEE.  
839 N.W.2d 305

Filed November 8, 2013. No. S-12-1160.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the district court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Evidence: Proof: Words and Phrases.** The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
3. **Parental Rights: Abandonment: Intent: Proof.** Whether a parent has abandoned a child within the meaning of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012) is a question of fact and depends upon parental intent, which may be determined by circumstantial evidence.
4. **Parental Rights: Abandonment: Words and Phrases.** Abandonment is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
5. **Parental Rights: Abandonment: Proof.** To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.
6. **Parental Rights: Abandonment: Time.** The time period for calculating the 6-month period of abandonment specified in Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012) is determined by counting back 6 months from the date the juvenile petition was filed.

7. **Parental Rights: Abandonment.** Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
8. **Parent and Child.** Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child.
9. **Juvenile Courts: Parental Rights.** A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
10. **Parental Rights.** Parental rights constitute a liberty interest.
11. \_\_\_\_\_. A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.
12. **Parental Rights: Juvenile Courts: Pleadings.** Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a court should have at its disposal the necessary information regarding the minor child's best interests, regardless of whether the information refers to a time period before or after the filing of the termination petition.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Reversed and remanded for further proceedings.

Kathleen Koenig Rockey, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellant.

Mark A. Keenan, of Keenan Law, P.C., L.L.O., for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

This appeal from an order terminating a father's parental rights comes to us in an unusual context. It began as a paternity action initiated by the father, although there is no actual dispute regarding paternity. The child in question, K.H., was born in August 2007. His birth certificate identifies appellant Kenneth C. as his biological father and appellee Lacie H. as his biological mother. Kenneth and Lacie never married, and they lived together for only about 2 months after K.H. was born.

In 2011, Kenneth filed a paternity action in the district court for Madison County. He sought an order declaring him to be the biological father of K.H. and awarding him visitation with K.H. Lacie filed an answer alleging that Kenneth's paternity claim was barred by the statute of limitations. In

a counterclaim, she asked the court to terminate Kenneth's parental rights based on abandonment. The court determined Kenneth's paternity claim was not barred by the statute of limitations and ultimately entered an order terminating Kenneth's parental rights. Kenneth perfected a timely appeal from that order, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.<sup>1</sup>

### BACKGROUND

Actions to determine paternity and parental support are governed by Neb. Rev. Stat. §§ 43-1401 through 43-1418 (Reissue 2008). Section 43-1411.01(1) confers jurisdiction on the district courts to adjudicate such actions, but § 43-1411.01(2) provided at the time of the court's order that "[w]henever termination of parental rights is placed in issue in any case arising under sections 43-1401 to 43-1418, subsection (5) of section 42-364 and the Parenting Act shall apply to such proceedings." Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012) governs child support, child custody, and visitation in domestic relations actions.

Because the counterclaim sought termination of Kenneth's parental rights, the district court was initially required to follow the procedures outlined in § 42-364(5)(a), which provided in part that "[t]he court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the . . . district court is a more appropriate forum." In an order entered on December 12, 2011, the district court determined that the statute of limitations set forth in § 43-1411 was not applicable to Kenneth's paternity claim and that because the case did "not appear to involve any of the resources normally used in the juvenile court system," the district court was the more appropriate forum for resolution of the issues presented. Neither party has assigned error with respect to this determination.

Section 42-364(5)(a) further required that if a district court does not transfer an action seeking termination of parental

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<sup>1</sup> Neb. Rev. Stat. § 24-1106 (Reissue 2008).

rights, the court “shall appoint an attorney as guardian ad litem to protect the interests of any minor child.” On December 12, 2011, the district court appointed attorney R.D. Stafford “as guardian ad litem for the minor child to investigate the facts and learn where the welfare of the minor child lies, and to submit a report of these facts based on the best interests of the minor child.”

Having completed these preliminary matters, the district court conducted an evidentiary hearing on the issue of whether Kenneth’s parental rights should be terminated. Pursuant to the version of § 42-364(5)(a) then in effect, a court

may terminate the parental rights of one or both parents after notice and hearing when the court finds such action to be in the best interests of the minor child, as defined in the Parenting Act, and it appears by the evidence that one or more of the grounds for termination of parental rights stated in section 43-292 exist[.]

Here, the only alleged statutory ground for termination was that defined by Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012), i.e., that Kenneth had “abandoned [K.H.] for six months or more immediately prior to the filing of the petition.” The hearing focused on that allegation.

Kenneth testified that he grew up in a family in which he and his siblings were neglected and abused by their parents and that he spent time in foster care from the age of 14 until he graduated from high school. He has received treatment for mental health issues, including suicidal thoughts, anger, and dealing with emotions. Kenneth and Lacie lived together in Norfolk, Nebraska, in 2006. In December of that year, Lacie told Kenneth she was pregnant. Although their relationship was sporadic, they were living together when K.H. was born in August 2007 and Kenneth was present for the birth. He testified that within 2 months of the birth, Lacie became distant and did not want anything to do with him.

Lacie testified that in late October 2007, Kenneth pushed her over a bed and held a knife to her in the presence of the baby. Lacie left and went to stay with her mother. Kenneth contacted her on October 29, and she told him the relationship was over. When Lacie returned to the apartment on October 31, she

found Kenneth in the bathroom. He had shaved his head and cut himself, carving out “I am sorry, Lacie” on his leg. Lacie stated that Kenneth had previously cut himself with kitchen knives on several occasions. As Lacie started to drive away from the apartment building, Kenneth grabbed the car door and Lacie said she had to brake quickly to avoid running over him. Kenneth claimed Lacie intentionally tried to hit him with the car. On November 1 and 2, Kenneth sent Lacie text messages threatening suicide if she did not call him.

Kenneth claimed he had attempted to keep in contact with Lacie and K.H. and that he asked a family friend to give Lacie some diapers and a Christmas tree in 2007. He testified that when he asked to see K.H. early in 2008, Lacie told him he would need to obtain a court order for visitation.

Several e-mail messages between Lacie and Kenneth were introduced into evidence. On January 15, 2008, Lacie wrote that she wanted K.H. to see Kenneth and be a part of his life, “but mom said she will stop helping me if you have anything to do with us.” She wrote, “If i [sic] let you see [K.H.] without going to court my mom would kill me. . . . If you want [K.H.] on the weekends that is fine with me if the courts will let you.” On February 13, Kenneth wrote to Lacie that he had had a heart attack and had asked for her and K.H. while he was in the hospital. Lacie wrote to Kenneth on February 14 and asked what had caused his heart attack. No response is included in the record.

Lacie testified that in February 2008, she and Kenneth agreed it would be best for him to terminate his parental rights to K.H. and that Kenneth agreed to talk to a lawyer about signing a relinquishment of his parental rights. He apparently never took any further action in this regard, and he disputes Lacie’s assertion that he signed an informal relinquishment document. No such document is in the record.

In March 2008, Lacie sought a protection order against Kenneth, alleging that he had been sending her text messages and telephoning her, threatening to commit suicide if she did not call him back. Because he mentioned Christmas lights she had on her balcony, Lacie believed he had been watching her apartment, and she said she was afraid to go outside. The

order was entered on March 18 and was to be in effect for 1 year. At the same time, Kenneth filed for a protection order against Lacie, but his complaint was dismissed.

Kenneth did not violate the protection order, and Lacie did not hear from him for its duration of 1 year. Kenneth moved to North Loup, Nebraska, where he lived with an uncle and worked at a hog confinement facility. In March 2009, he moved to Wyoming, where he worked in road construction. He testified that while in Wyoming, he called Lacie's mother to ask what he needed to pay for child support and she told him he should terminate his parental rights and "walk away." Kenneth offered telephone records to show that he contacted Lacie's mother on multiple occasions, but he often was able to only leave a message. Kenneth also testified that he left money or gifts for K.H. in Lacie's mother's mailbox or at her home. In May 2009, 2 months after the protection order expired, Kenneth called Lacie at work, but she refused to talk to him.

Kenneth testified that in May 2009, he contacted the "child support network" in Lincoln, Nebraska, to make arrangements to pay child support but that he never submitted the forms provided by the "network."

At the time of the hearing, Kenneth was living with a woman who was in the process of obtaining a divorce. The woman testified that she has three young children and that Kenneth is "an amazing person" around her children.

Lacie testified that she sought termination of Kenneth's parental rights due to his mental instability, inability to maintain employment, and failure to provide support. She stated that K.H. does not know Kenneth but that K.H. has a "father figure" in Lacie's fiancé, whom he calls "dad." Lacie expressed her opinion that termination of Kenneth's parental rights was in K.H.'s best interests.

Stafford, the guardian ad litem, testified that in his opinion, termination of Kenneth's parental rights was in K.H.'s best interests, primarily due to the fact that there had been no contact between Kenneth and K.H. for most of K.H.'s life. Stafford based his opinion on interviews with Kenneth, Lacie, Lacie's mother, and other friends and relatives of both parties.

Stafford did not talk to K.H. or meet Lacie's fiancée, and he did not observe any interaction between Lacie's fiancée and K.H. Stafford had no opinion as to either parties' parenting skills or abilities. He said he could not make a psychological assessment as to any potential harm to K.H. if he were to have contact with Kenneth. Stafford based his opinion regarding the best interests of K.H. solely upon the passage of time and Kenneth's failure to seek contact with Lacie and K.H. after expiration of the protection order in March 2009.

The district court entered an order terminating Kenneth's parental rights. The court found that Kenneth had had no contact with K.H. since October 23, 2007, less than 2 months after he was born, and that Kenneth had had no contact with Lacie since May 2009. Regarding the conflicting evidence as to Kenneth's efforts to reestablish contact with K.H., the court concluded that Kenneth had abandoned K.H., noting:

The clear evidence is that [Kenneth] had no contact, and his efforts, even if made, were insubstantial. He never followed through with anything that he claims to have done, including completing and returning child support documents that he had received from the State at his request.

. . . .

The credible evidence is that for nearly two and a half years prior to the filing of the complaint, [Kenneth] had no contact with [K.H.], paid no child support, and did not inquire as to [K.H.'s] well-being.

In concluding that termination of Kenneth's parental rights would be in the best interests of K.H., the district court reasoned that K.H. "has had no contact with [Kenneth] during [K.H.'s] cognizant life. They have no relationship. The court finds that the general health, welfare, and social behavior of [K.H.] will be best served by not now injecting [Kenneth] into [K.H.'s] life in which [Kenneth] has never existed."

#### ASSIGNMENTS OF ERROR

Kenneth assigns that the district court abused its discretion in finding that he had abandoned K.H., in determining that his parental rights should be terminated, and in finding

that it was in the best interests of K.H. that Kenneth's rights be terminated.

### STANDARD OF REVIEW

[1] Although this is not a typical juvenile case governed exclusively by the Nebraska Juvenile Code,<sup>2</sup> the district court was required to apply the provisions of § 43-292 in order to determine whether Kenneth's parental rights should be terminated. Accordingly, the standard of review applicable to juvenile cases is applicable here. Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.<sup>3</sup> However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the district court observed the witnesses and accepted one version of the facts over the other.<sup>4</sup>

### ANALYSIS

[2] The grounds for terminating parental rights must be established by clear and convincing evidence, which is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.<sup>5</sup> With this principle in mind, we examine Kenneth's arguments that the evidence was insufficient to establish either that he abandoned K.H. or that termination of his parental rights would be in K.H.'s best interests.

### ABANDONMENT

[3-5] Whether a parent has abandoned a child within the meaning of § 43-292(1) is a question of fact and depends upon parental intent, which may be determined by circumstantial

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<sup>2</sup> See Neb. Rev. Stat. §§ 43-245 to 43-2,127 (Reissue 2008 & Cum. Supp. 2012).

<sup>3</sup> *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012); *In re Interest of Chance J.*, 279 Neb. 81, 776 N.W.2d 519 (2009).

<sup>4</sup> *Id.*

<sup>5</sup> *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). See, also, *In re Interest of Shelby L.*, 270 Neb. 150, 699 N.W.2d 392 (2005).

evidence.<sup>6</sup> Abandonment is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.<sup>7</sup> To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.<sup>8</sup>

[6] In juvenile cases, the time period for calculating the 6-month period of abandonment specified in § 43-292(1) is determined by counting back 6 months from the date the juvenile petition was filed.<sup>9</sup> Here, the district court computed the 6-month period from October 5, 2011, the date on which Kenneth filed his complaint, and neither party assigns or argues that this is not the appropriate time period. The record clearly shows that Kenneth had no personal contact with K.H. during this time. In fact, his only direct contact with K.H. was during the 2 months immediately after his birth, approximately 4 years before Kenneth filed his complaint. And Kenneth had no contact with Lacie with regard to K.H. after May 2009, almost 2½ years before the complaint was filed.

[7,8] There is disputed evidence regarding Kenneth's attempts to establish contact with Lacie and K.H. after their separation in October 2007. While Kenneth claims he made a number of telephone calls to Lacie's mother, sent money to Lacie or her mother, and tried to provide gifts for K.H., Lacie and her mother testified that he made no such efforts. It is undisputed that Kenneth has never paid child support, despite obtaining the legal forms necessary to do so. We agree with the observation of the district court that Kenneth's efforts

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<sup>6</sup> See *In re Interest of Chance J.*, *supra* note 3.

<sup>7</sup> See *id.*

<sup>8</sup> *Id.*

<sup>9</sup> See *id.*

to establish contact with K.H., even if made, were insubstantial. In cases involving similar factual circumstances, we have stated that abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.<sup>10</sup> Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child.<sup>11</sup> Kenneth's sporadic, insubstantial efforts to establish a relationship with his son, coupled with his complete failure to provide financial support, constitute clear and convincing evidence of abandonment.

#### BEST INTERESTS

Even after properly finding grounds for abandonment, the district court could not terminate Kenneth's parental rights unless such action was "in the best interests of the minor child, as defined in the Parenting Act."<sup>12</sup> The Parenting Act<sup>13</sup> defines "[b]est interests of the child" as "the determination made taking into account the requirements stated in section 43-2923."<sup>14</sup> Section 43-2923 addresses the best interests of a child in the context of parenting, visitation, and custody arrangements within an intact parental relationship. It includes a list of five nonexclusive factors which a court is to consider in making this determination.

The first factor is "[t]he relationship of the minor child to each parent prior to the commencement of the action . . . ."<sup>15</sup> As noted, Kenneth and K.H. have had no relationship whatsoever since October 2007, when K.H. was approximately 2 months old. This was the principal basis for the opinion of the

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<sup>10</sup> *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010); *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999).

<sup>11</sup> See *id.*

<sup>12</sup> § 42-364(5)(a). See, also, *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

<sup>13</sup> Neb. Rev. Stat. §§ 43-2920 to 43-2943 (Reissue 2008 & Cum. Supp. 2012).

<sup>14</sup> § 43-2922(3).

<sup>15</sup> § 42-2923(6)(a).

guardian ad litem that termination of Kenneth's parental rights would be in K.H.'s best interests. In contrast, K.H. appears to have a good relationship with Lacie.

The second factor is "[t]he desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning."<sup>16</sup> The record provides no basis to evaluate this factor. Because K.H. is unaware of his biological father, he would have no basis for expressing his "desires and wishes" regarding a relationship with Kenneth.

The third factor is "[t]he general health, welfare, and social behavior of the minor child."<sup>17</sup> The record shows that, at least in Lacie's opinion, K.H. is developing normally in her care, despite Kenneth's prolonged absence from his life. Lacie testified that K.H. is a well-behaved child with no ongoing medical needs and that he is "on target educationally." However, the guardian ad litem did not talk to K.H. and there was no other evidence as to his health, welfare, and behavior.

The fourth factor is "[c]redible evidence of abuse inflicted on any family or household member."<sup>18</sup> And the fifth factor is "[c]redible evidence of . . . domestic intimate partner abuse."<sup>19</sup> Kenneth's conduct while he and Lacie lived together before and after the birth of K.H. would constitute both domestic intimate partner abuse and abuse inflicted on a household member under the definitional provisions of the Parenting Act.<sup>20</sup> Lacie described the relationship as "terrifying." She described multiple incidents when Kenneth cut himself with kitchen knives or wrapped a belt or strap around his neck as if to strangle himself. These incidents occurred in or near the parties' apartment, both before and after the birth of K.H. She also described an incident on October 23, 2007, when Kenneth

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<sup>16</sup> § 42-2923(6)(b).

<sup>17</sup> § 42-2923(6)(c).

<sup>18</sup> § 43-2923(6)(d).

<sup>19</sup> § 43-2923(6)(e).

<sup>20</sup> See § 43-2922(8) and (10). See, also, Neb. Rev. Stat. § 42-903 (Cum. Supp. 2012) (incorporated by reference in §§ 43-2922(8) and 43-2923(6)(d)).

pushed her down and threatened her with a knife in the presence of K.H.

After Kenneth left foster care at the age of 18, he reunited with his biological mother. She obtained a protection order against him in 2006, so he moved in with Lacie and her mother for about 1 month in the summer of 2006. He denied any self-destructive behavior in Lacie's presence. He claimed that Lacie attempted to run him over with her vehicle, but Lacie denies this allegation. Based upon our *de novo* review of the entire record, we conclude that there is credible evidence of abusive behavior on the part of Kenneth, including abuse directed at Lacie, and little credible evidence of abusive behavior on the part of Lacie. There is no evidence that Kenneth ever abused K.H.

If this were a custody dispute, we would agree that consideration of these factors and the evidence would support a finding that it is in the best interests of K.H. to remain in the sole legal and physical custody of Lacie. But Kenneth does not seek custody. He seeks only visitation and the preservation of his parental rights. In such a context, the nonexhaustive nature of the factors listed in § 43-2923(6) is particularly relevant, and we do not limit our analysis to only those factors.

[9-11] It is well established that a juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.<sup>21</sup> It is also well established that parental rights constitute a liberty interest.<sup>22</sup> As the U.S. Supreme Court has noted, "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it."<sup>23</sup> Thus, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural

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<sup>21</sup> *In re Interest of Sir Messiah T. et al.*, *supra* note 12; *In re Interest of Aaron D.*, *supra* note 5.

<sup>22</sup> See *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

<sup>23</sup> *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

relationship.”<sup>24</sup> That is no less true where, as here, one parent asks a court to terminate the other parent’s rights with respect to their child. A parent’s interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.<sup>25</sup>

As we have noted, termination of parental rights requires proof of two elements: (1) that one or more statutory grounds for termination exist and (2) that termination would be in the best interests of the child. Statutory grounds are based on a parent’s past conduct, but the best interests element focuses on the future well-being of the child. While proof of the former will often bear on the latter, a court may not simply assume that the existence of a statutory ground for termination necessarily means that termination would be in the best interests of the child. Rather, that element must be proved by clear and convincing evidence.

There is ample evidence in the record that Kenneth has not fulfilled his parental obligations to K.H. in the past. But there is almost no evidence upon which we can make a principled determination of whether the current circumstances are such that termination of Kenneth’s parental rights would be in the child’s best interests. For example, one reason Lacie sought termination of Kenneth’s parental rights was because of his “mental instability.” But she acknowledged at trial that this was based on his behavior during and prior to their relationship, and she had no information about his present mental health. The record contains no professional psychological assessment of Kenneth upon which to assess his current or future parenting capability. Although Kenneth’s prior behavior provides cause for concern, there is no clear and convincing evidence that he is presently unfit as a parent due to “mental instability.”

The opinion of the guardian ad litem that termination of Kenneth’s parental rights would be in the best interests of K.H. was based primarily upon the “passage of time” during

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<sup>24</sup> *Id.*, 455 U.S. at 760.

<sup>25</sup> *In re Interest of Aaron D.*, *supra* note 5; *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999).

which Kenneth had no contact with the child. The guardian ad litem was unable to render an opinion concerning the parenting skills of either Kenneth or Lacie. Stafford did not interview K.H. or Lacie's fiance or observe the fiance's interaction with K.H. And Stafford specifically stated that he could not give a psychological opinion about any impact on K.H. if Kenneth is allowed into his life. Stafford did not visit Kenneth in his current home, but based his opinion on a previous residence. Stafford also acknowledged that if resources were available, experts could be utilized to minimize any adverse effects of visitation on a supervised basis. Although Kenneth is currently a stranger to K.H., that fact alone does not establish that there could not be a paternal relationship which would be beneficial to K.H.

In cases where a child has been in foster care for an extended period of time while a parent has unsuccessfully dealt with issues of fitness, we have cited the child's need for permanency as a basis for concluding that termination of parental rights was in the child's best interests.<sup>26</sup> But that is not an issue of the same magnitude in this case, because K.H. will have permanency with Lacie, regardless of whether Kenneth's parental rights are terminated. And Kenneth's stated willingness to provide financial support to K.H., despite his past failure to do so, can only be viewed as a factor which must be weighed against termination of his parental rights.

[12] As we stated in *In re Interest of Aaron D.*,<sup>27</sup> the primary consideration in determining whether to terminate parental rights is the best interests of the child. To make such a determination, a court should have at its disposal the necessary information regarding the minor child's best interests, regardless of whether the information refers to a time period before or after the filing of the termination petition. In that case, while there was evidence which raised doubt about a mother's ability to be an effective parent, we held that the

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<sup>26</sup> See, e.g., *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012); *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

<sup>27</sup> *In re Interest of Aaron D.*, *supra* note 5.

State had failed to prove that termination of her parental rights would be in the child's best interests, noting that there was no testimony from therapists, family support workers, or other persons who were "most able to testify as to [the child's] condition, circumstances, and best interests, both before and after the filing of the termination petition."<sup>28</sup> Indeed, we noted that the "only expert testimony present in the record pertinent to how termination would affect [the child] indicated that he would be harmed by the termination of [the mother's] parental rights."<sup>29</sup>

In this case, the record discloses that K.H.'s unmarried parents had a brief, stormy relationship followed by almost 4 years during which Kenneth had no contact with and provided no financial support for K.H. But it provides no evidence that Kenneth is currently unfit to be a parent and no explanation of how K.H.'s interests would be served by judicial foreclosure of any future relationship with and support from Kenneth, both of which Kenneth now says he is ready to provide. Nor is there any evidence of a likelihood that K.H. would be harmed by the relationship and visitation which Kenneth now seeks. Accordingly, we conclude that Lacie did not meet her burden of presenting clear and convincing evidence that termination of Kenneth's parental rights would be in the best interests of K.H.

### CONCLUSION

For the reasons discussed herein, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR  
FURTHER PROCEEDINGS.

HEAVICAN, C.J., not participating.

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<sup>28</sup> *Id.* at 263, 691 N.W.2d at 175.

<sup>29</sup> *Id.* at 266, 691 N.W.2d at 177.

BUTLER COUNTY SCHOOL DISTRICT 12-0502, ALSO KNOWN AS  
EAST BUTLER PUBLIC SCHOOL DISTRICT, A POLITICAL SUBDIVISION  
OF THE STATE OF NEBRASKA, APPELLANT, AND BRENDA COUFAL,  
AN INDIVIDUAL RESIDENT TAXPAYER OF BUTLER COUNTY  
SCHOOL DISTRICT 12-0502, ALSO KNOWN AS EAST  
BUTLER PUBLIC SCHOOL DISTRICT, APPELLEE, V.  
FREEHOLDER PETITIONERS 1 THROUGH 10:  
FERN JANSO ET AL., APPELLEES.  
839 N.W.2d 316

Filed November 8, 2013. No. S-13-123.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Jurisdiction.** For the prior jurisdiction rule to apply, there must be equivalent proceedings.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Rex R. Schultze and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Maureen Freeman-Caddy, of Bromm, Lindahl, Freeman-Caddy & Lausterer, for appellees Fern Janso et al.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LEMAN, and CASSEL, JJ.

MILLER-LEMAN, J.

#### NATURE OF CASE

This case has previously been before this court. See *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012) (*East Butler I*). The underlying case stems from petitions filed by freeholders, the appellees, before the Saunders County freeholder board (the Board) in which they successfully sought to move their property from the Prague Public School District (Prague District) to the Wahoo Public School District (Wahoo District). Butler County School District 12-0502, also known as the East Butler Public School District (East Butler), the appellant, objects to the appellees' petitions

primarily because East Butler, along with the Prague District, had a petition pending before the State Committee for the Reorganization of School Districts (Reorganization Committee) involving a proposed merger at the time the appellees filed their freeholder petitions. The merger plan encompassed the appellees' property.

In *East Butler I*, we concluded, inter alia, that East Butler had standing to appeal the Board's decision and we remanded the cause to the district court before which the appeal from the Board's decision was pending. Following remand, the district court rejected East Butler's argument that the Board lacked jurisdiction. East Butler contended that the Reorganization Committee had exclusive jurisdiction to act under the "prior jurisdiction rule." The district court determined, inter alia, that the prior jurisdiction rule did not apply to this case and that the Board had jurisdiction over the appellees' freeholder petitions. The district court affirmed the Board's order. East Butler appeals. We affirm.

### STATEMENT OF FACTS

In *East Butler I*, we set forth the facts by stating:

The district court summarized the facts as follows:

- On April 13, 2010, East Butler and the Prague District filed a petition and plan for dissolution and merger with the Reorganization Committee.
- On April 20, 2010, the appellees filed freeholder petitions with the Board seeking to remove property owned by them from the Prague District and move it to the Wahoo District.
- On May 14, 2010, the Reorganization Committee approved the dissolution and merger and entered an order merging East Butler and the Prague District. This order did not become effective immediately.
- On May 17, 2010, the Board granted the appellees' petitions to move their property into the Wahoo District.
- On June 10 [sic], 2010, the merger of East Butler and the Prague District became effective.
- On July 1, 2010, East Butler appealed [the Board's decision] to the district court. In the appeal, East Butler

sought vacation or reversal of the Board's order. It alleged that the Board lacked jurisdiction because the Reorganization Committee had exclusive jurisdiction over the matter or that the Reorganization Committee had prior jurisdiction to act under the prior jurisdiction rule.

The district court dismissed the appeal for lack of jurisdiction. It found that East Butler had not complied with [Neb. Rev. Stat.] § 79-458(5) [Reissue 2008] when that section was read in *pari materia* with Neb. Rev. Stat. § 23-136 (Reissue 2007). Section 79-458(5) permits a party to appeal from an action of a freeholder board in the same manner that a party can appeal from a county board's allowance or disallowance of a claim. The court read § 79-458(5) to require a party to comply with the time limit to appeal under § 23-136, which governs appeals from a county board's allowance of a claim. Because East Butler did not appeal within the 10 days specified for appeals under § 23-136, the court determined that it did not acquire jurisdiction over the appeal. In addition, citing case law holding that a school district cannot maintain an action to challenge its boundaries, the court found that East Butler lacked standing.

283 Neb. at 905-06, 814 N.W.2d at 727.

At the Board's hearing held on May 17, 2010, regarding the appellees' freeholder petitions, the appellees were represented by counsel and presented evidence. The superintendent for the Prague District, along with counsel, also attended the Board's hearing. The Prague District's attorney presented evidence and testified in opposition to the appellees' freeholder petitions, arguing that the Board lacked jurisdiction over the petitions.

As stated above, East Butler appealed the Board's decision approving the appellees' freeholder petitions to the district court. The district court held a hearing on October 4, 2010, at which East Butler's and the appellees' attorneys were present and evidence was received. On March 14, 2011, the district court held a hearing on the appellees' motion to dismiss and conducted a trial. At the March 14 combined hearing and trial,

East Butler's attorney offered and the district court received the certified transcript from the Board's May 17, 2010, hearing. The appellees' attorney offered exhibits that the district court received, including the agendas and minutes from two meetings held by the East Butler school board and a general billing statement for services rendered from a law firm to East Butler. At the March 14, 2011, hearing and trial in district court, East Butler's attorney stated that

[t]his case is, for purposes of East Butler, really is not dealing with the freeholder's petition [sic], it's not challenging the freeholder's petition [sic] directly. This has more to do with seeking to enforce the order of the [Reorganization Committee] and that the [Reorganization Committee] had exclusive jurisdictions [sic] to hear that order and consolidate the school districts, exclusive of the . . . Board.

At the March 14, 2011, hearing and trial in district court, the appellees' attorney called two witnesses: a taxpayer in the East Butler school district and the superintendent of East Butler Public Schools. The superintendent testified that he did not exactly recall when he learned of the appellees' intention to file freeholder petitions but that he "believe[d] this started even at the end of 2009 and into 2010," which is before East Butler and the Prague District filed their petition and plan for dissolution and merger with the Reorganization Committee on April 13, 2010. The superintendent further testified that the appellees' freeholder petitions "had been a concern from the very beginning when we [East Butler and the Prague District] were looking at merging." In this regard, we note that the record shows the merger petition filed before the Reorganization Committee excluded from the merger result freeholders who had already filed freeholder petitions prior to the filing of the merger petition. The merger petition did not, however, make provision for freeholders who might file after the merger petition was filed and whose freeholder petitions might be pending while the merger petition was under consideration before the Reorganization Committee.

As stated above, the district court determined that East Butler lacked standing and that the appeal was untimely, and

therefore dismissed East Butler's appeal for lack of jurisdiction. East Butler appealed, resulting in our decision in *East Butler I*. With regard to standing in *East Butler I*, we stated that "because East Butler had a valid merger petition that involved the same property pending at the time of the appellees' freeholder petitions, it had sufficient interest in the matter to invoke the court's jurisdiction" and we therefore concluded that East Butler had standing to appeal. 283 Neb. at 905, 814 N.W.2d at 726-27. With regard to the timeliness of the appeal in *East Butler I*, we determined that East Butler's appeal was timely under Neb. Rev. Stat. § 79-458(5) (Reissue 2008), which provides that appeals may be taken from the action of a freeholder board on or before August 10. Our ruling was based on the record that showed the Board had rendered its decision on May 17, 2010, and East Butler had appealed to the district court on July 1, which was before the August 10 deadline. Accordingly, in *East Butler I*, we reversed the district court's order of dismissal and remanded the cause for further proceedings.

On remand, the case was submitted to the district court on the record which had been made leading to *East Butler I*. East Butler argued to the district court that the Board lacked jurisdiction because the Reorganization Committee had prior jurisdiction to act under the common-law "prior jurisdiction rule." In its order filed January 22, 2013, the district court stated that the "application of the prior jurisdiction rule is not appropriate" in this case and that the Board had jurisdiction over the appellees' freeholder petitions. The district court considered the factors underlying application of the prior jurisdiction rule and determined application of the prior jurisdiction rule was not warranted, inter alia, because the two actions were not equivalent, i.e., one action was a school reorganization case, and the other action was a freeholder petition case. The district court also based its decision on the language of § 79-458 as amended in 2007 apparently in support of its finding that the appellees' freeholder petitions, when filed, were to remove land from an existing school district. The district court affirmed the Board's order granting the freeholder petitions.

East Butler appeals.

### ASSIGNMENTS OF ERROR

East Butler claims on appeal, restated, that the district court erred when it (1) determined that the prior jurisdiction rule was not applicable and (2) concluded that the Board had jurisdiction to hear the appellees' freeholder petitions.

### STANDARDS OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Holdsworth v. Greenwood Farmers Co-op*, ante p. 49, 835 N.W.2d 30 (2013). We independently review questions of law decided by a lower court. *Pinnacle Enters. v. City of Papillion*, ante p. 322, 836 N.W.2d 588 (2013).

### ANALYSIS

East Butler argues that the district court should have adopted and applied the prior jurisdiction rule and that because East Butler took the first valid step, the court should have determined that under the prior jurisdiction rule, the Reorganization Committee had "exclusive" jurisdiction over the property at issue. Brief for appellant at 18. East Butler thus claims that because the Reorganization Committee had "exclusive" jurisdiction under the prior jurisdiction rule, the district court erred when it determined that the Board had jurisdiction to hear the appellees' freeholder petitions. East Butler does not rely on a statutory basis in support of its assigned errors.

There are no factual disputes regarding the jurisdictional question before us, so we independently review the district court's decision as a matter of law. See, *Pinnacle Enters. v. City of Papillion*, *supra*; *Holdsworth v. Greenwood Farmers Co-op*, *supra*. We reject East Butler's argument that the prior jurisdiction rule applies to this case and conclude that the district court did not err when it declined to adopt or apply the prior jurisdiction rule. We further conclude that the district court did not err when it determined that the Board had jurisdiction over the appellees' freeholder petitions. For completeness, we note that East Butler does not assign as error the district court's determination on the merits affirming the Board's grant of the appellees' freeholder petitions. Accordingly, we affirm.

We note that it was not necessary to consider the application of the prior jurisdiction rule in *East Butler I*. And although we have not previously adopted the prior jurisdiction rule, we discussed the rule in an annexation case, *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). In *City of Elkhorn*, we described the prior jurisdiction rule as it related to the subject of annexation by stating:

Under the prior jurisdiction rule, when two public bodies claim jurisdiction over the same territory in annexation proceedings, the public body which takes the first valid step toward annexation has the superior claim. And it may complete its proceedings if it acts promptly and in accordance with statutory requirements.

272 Neb. at 883, 725 N.W.2d at 807.

In *City of Elkhorn*, we stated that “[w]e need not determine whether to adopt the prior jurisdiction rule because we conclude that the rule is not applicable when different territories are the subject of the competing annexations.” 272 Neb. at 884, 725 N.W.2d at 807. We further noted that “some courts have declined to apply the prior jurisdiction rule as antiquated or superseded by statutory procedures.” *Id.* (citing cases). The cases cited generally show that priority between competing annexation proceedings has been resolved by statutes.

When describing the prior jurisdiction rule in *City of Elkhorn*, we cited to Eugene McQuillin’s treatise, “The Law of Municipal Corporations.” The treatise describes the prior jurisdiction rule generally and thereafter focuses on the elements necessary for its application. This treatise introduces the prior jurisdiction rule by stating:

The rule that among separate equivalent proceedings relating to the same subject matter, that one which is prior in time is prior in jurisdiction to the exclusion of those subsequently instituted, applies, generally speaking, to and among proceedings for the municipal incorporation, annexation, or consolidation of a particular territory.

2 Eugene McQuillin, *The Law of Municipal Corporations* § 7:39 at 674-76 (3d ed. 2006). See, also, 62 C.J.S. *Municipal Corporations* § 76 at 94 (2011) (stating that “‘prior pending

proceedings rule' provides that where two municipalities attempt to annex the same area at approximately the same time, the legal proceedings first instituted, if valid, have priority, *but there must be equivalent proceedings*") (emphasis supplied). In addition to municipal corporations, the prior jurisdiction rule has been applied to cases involving competing school districts. See, e.g., *State v. Reorganized District No. 11*, 307 S.W.2d 501 (Mo. 1957) (in action brought between competing school districts and other parties, writ of quo warranto issued based on application of prior jurisdiction rule).

Following the introductory remarks, the treatise thereafter focuses on the elements necessary to apply the prior jurisdiction rule, and it is the absence of the element of equivalent proceedings which determines the outcome of this case. McQuillin's treatise states, "The prior jurisdiction rule applies where the proceedings are equivalent. If they are not equivalent, the prior jurisdiction rule does not apply." 2 McQuillin, *supra*, § 7:39 at 680.

The opinion in *Yandle v. Mecklenburg County and Mecklenburg County v. Town of Matthews*, 85 N.C. App. 382, 355 S.E.2d 216 (1987), cited in McQuillin's treatise, provides an example of a case where the prior jurisdiction rule did not apply because the proceedings at issue—a condemnation matter and annexation matter—were not equivalent. In *Yandle*, a county commenced eminent domain proceedings by initiating condemnation of certain property that the county intended to use as a landfill; however, the property at issue was already being considered for voluntary annexation. The North Carolina Court of Appeals determined that annexation proceedings and eminent domain proceedings were not equivalent and that accordingly, the prior jurisdiction rule did not apply.

The *Yandle* court stated the framework for its analysis as follows:

The court below concluded that the prior jurisdiction rule was applicable without first considering whether the annexation and condemnation proceedings are "equivalent proceedings relating to the same subject matter."

*City of Burlington v. Town of Elon College*, 310 N.C. [723,] 727, 314 S.E.2d [534,] 537 [1984]. This conclusion was in error. The court should have first made the determination of whether the proceedings are equivalent. If they are, the prior jurisdiction rule would apply. If they are not equivalent, the court could not use the prior jurisdiction rule and must look elsewhere to determine how to proceed. We hold that, for determining whether the prior jurisdiction rule applies, eminent domain proceedings and annexation proceedings are not equivalent.

85 N.C. App. at 388, 355 S.E.2d at 220.

In the present case, we first examine whether the merger petition case and the freeholder petitions case are equivalent proceedings and we conclude they are not. East Butler and the Prague District initiated proceedings to reorganize and merge their existing school districts into one public school district. We have noted that there are two methods available to accomplish a school district reorganization: the election method and the petition method. *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, 270 Neb. 140, 699 N.W.2d 25 (2005). The election method, which was not utilized in this case, is governed by Neb. Rev. Stat. §§ 79-432 to 79-451 (Reissue 2008). The petition method is governed by Neb. Rev. Stat. §§ 79-413 to 79-422 (Reissue 2008 & Cum. Supp. 2012). The petition method may be conducted in two ways: by petition signed by the voters or by the actions of the boards of education for the separate school districts. East Butler and the Prague District utilized the latter petition method to initiate the merger and reorganization proceedings under discussion. East Butler and the Prague District filed their petition and plan for dissolution and merger with the Reorganization Committee on April 13, 2010, under § 79-415(1), which provides:

In addition to the petitions of legal voters pursuant to section 79-413, changes in boundaries and the creation of a new school district may be initiated and accepted by the school board or board of education of any district that is not a member of a learning community.

The appellees, who are freeholders, petitioned to remove their property from one school district and move the property

to another district pursuant to § 79-458. Under § 79-458, the appellees filed their freeholder petitions with the Board, composed of the county assessor, county clerk, and county treasurer, on April 20, 2010, seeking to remove their property from the Prague District and move it to the Wahoo District. Section 79-458 provides in part:

(1) Any freeholder or freeholders, person in possession or constructive possession as vendee pursuant to a contract of sale of the fee, holder of a school land lease under section 72-232, or entrant upon government land who has not yet received a patent therefor may file a petition on or before June 1 for all other years with a board consisting of the county assessor, county clerk, and county treasurer, asking to have any tract or tracts of land described in the petition set off from an existing school district in which the land is situated and attached to a different school district which is contiguous to such tract or tracts of land if:

(a)(i) The school district in which the land is situated is a Class II or III school district which has had an average daily membership in grades nine through twelve of less than sixty for the two consecutive school fiscal years immediately preceding the filing of the petition;

(ii) Such Class II or III school district has voted pursuant to section 77-3444 to exceed the maximum levy established pursuant to subdivision (2)(a) of section 77-3442, which vote is effective for the school fiscal year in which the petition is filed or for the following school fiscal year;

(iii) The high school in such Class II or III school district is within fifteen miles on a maintained public highway or maintained public road of another public high school; and

(iv) Neither school district is a member of a learning community; or

(b) Except as provided in subsection (7) of this section, the school district in which the land is situated, regardless of the class of school district, has approved a budget for the school fiscal year in which the petition is filed that

will cause the combined levies for such school fiscal year, except levies for bonded indebtedness approved by the voters of such school district and levies for the refinancing of such bonded indebtedness, to exceed the greater of (i) one dollar and twenty cents per one hundred dollars of taxable valuation of property subject to the levy or (ii) the maximum levy authorized by a vote pursuant to section 77-3444.

For purposes of determining whether a tract of land is contiguous, all petitions currently being considered by the board shall be considered together as a whole.

[3] In the present case, we stated in *East Butler I* that the appellees' freeholder petitions involve the "same territory" that was part of East Butler's reorganization and merger plan. 283 Neb. at 904, 814 N.W.2d at 726. However, as stated above, for the prior jurisdiction rule to apply, there must be equivalent proceedings, and thus we examine the nature of the two proceedings.

East Butler and the appellees initiated their proceedings under different statutes, utilizing §§ 79-413 to 79-422 and 79-458, respectively. The two proceedings are subject to different deadlines; e.g., the freeholders must file their request by June 1, § 79-458(1), whereas the Reorganization Committee must rule on a petition by June 1, Neb. Rev. Stat. § 79-479(1)(b) (Reissue 2008). The parties in the two proceedings are not identical. The initial proceedings are conducted before two different entities, i.e., the Reorganization Committee and the Board. The object of the school districts' reorganization and merger action was to merge the two existing school districts of East Butler and the Prague District into one school district. In contrast, the object of the appellees' freeholder petitions was to remove their property from one school district, namely the Prague District, into another school district, namely the Wahoo District.

The court in *Yandle v. Mecklenburg County and Mecklenburg County v. Town of Matthews*, 85 N.C. App. 382, 355 S.E.2d 216 (1987), referred to Black's Law Dictionary when discussing equivalent proceedings, and we find the definition helpful. Black's Law Dictionary 620 (9th ed. 2009) defines

“equivalent” as “1. Equal in value, force, amount, effect, or significance. 2. Corresponding in effect or function; nearly equal; virtually identical.” We cannot say that the proceedings utilized by East Butler to reorganize and merge the two school districts are equivalent to the proceedings utilized by the appellees as freeholders to remove the appellees’ property from one school district and move it into another school district. The two proceedings are not equal in effect or significance. Because the two proceedings are not equivalent, we conclude that the prior jurisdiction rule, if adopted, would not apply to this case. The district court did not err when it so concluded.

For completeness, we note that as indicated in the “Statement of Facts” section, the school districts were present throughout the proceedings in this freeholder case. The Prague District’s superintendent was present along with counsel at the hearing on the appellees’ petition before the Board on May 17, 2010. The Prague District’s attorney testified in opposition to the appellees’ freeholder petitions and presented evidence. Furthermore, East Butler was represented by counsel at the hearings and trial before the district court on appeal in *East Butler I*, on remand to the district court following our decision in *East Butler I*, and in the present appeal. Accordingly, the school districts have been able to participate and make their interests known throughout the proceedings regarding the appellees’ freeholder petitions.

We do not find a statutory basis to reach the result urged by East Butler, and we have concluded that the common-law prior jurisdiction rule, if adopted, would not apply.

### CONCLUSION

Because the prior jurisdiction rule, if adopted, does not apply to this case, we determine that the district court did not err when it determined that the Board had jurisdiction over the appellees’ freeholder petitions and affirmed the decision of the Board.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.  
JEREMY D. FOSTER, APPELLANT.  
839 N.W.2d 783

Filed November 15, 2013. No. S-10-1228.

1. **Trial: Joinder.** There is no constitutional right to a separate trial.
2. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
3. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
4. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
5. **Trial: Joinder: Juries.** A court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.
6. **Trial: Joinder: Proof.** To prevail on a severance argument, a defendant must show compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever.
7. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. A defendant must show that a joint trial caused him or her such compelling prejudice that he or she was deprived of a fair trial.
8. **Pleadings: Parties: Judgments: Appeal and Error.** A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.
9. **Trial: Evidence: Joinder.** The existence of mutually antagonistic defenses is not prejudicial per se.
10. **Trial: Joinder: Proof.** In order to be entitled to severance based on mutually exclusive defenses, the defendant must show real prejudice, rather than merely note that each defendant is trying to exculpate himself or herself while inculpat- ing the other.
11. **Criminal Law: Aiding and Abetting; Trial: Evidence.** The fact that one codefendant was defending against the charge of aiding and abetting the other codefendant in committing the underlying crime does not necessarily create mutually exclusive defenses.
12. **Criminal Law: Aiding and Abetting.** Aiding and abetting is simply another basis for holding an individual liable for the underlying crime.
13. \_\_\_\_: \_\_\_\_\_. Neb. Rev. Stat. § 28-206 (Reissue 2008) provides that a person who aids or abets may be prosecuted and punished as if he or she were the princi- pal offender.
14. **Trial: Waiver: Appeal and Error.** The failure to make a timely objection waives the right to assert prejudicial error on appeal.

15. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
16. **Hearsay: Extrajudicial Statements.** An extrajudicial statement not offered to prove the truth of the matter asserted is not hearsay.
17. **Constitutional Law: Criminal Law: Trial: Witnesses.** In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her.
18. **Criminal Law: Witnesses: Testimony.** Statements to friends, relatives, accomplices, and anyone outside the criminal justice system are not testimonial.
19. **Criminal Law: Witnesses: Testimony: Intent.** A statement that is not intended for use in the prosecution of a crime and that law enforcement had no role in obtaining is not testimonial.
20. **Trial: Juries.** When a case is finally submitted to the jury, jury members must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court.
21. **Trial: Juries: Waiver.** A defendant can waive the right to sequester the jury.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Glenn Shapiro and Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-  
LERMAN, JJ., and CASSEL, Judge.

WRIGHT, J.

## I. NATURE OF CASE

Jeremy D. Foster was charged with one count of murder in the first degree, four counts of assault in the second degree, and five counts of use of a deadly weapon to commit a felony. His codefendant, Darrin D. Smith, was charged with the same crimes, and the two were tried jointly. A jury convicted both Smith and Foster on all counts, and they were each sentenced to life imprisonment plus 96 to 150 years. Smith and Foster perfected timely separate appeals to this court. Because each has assigned different errors and makes distinct arguments, we address the two appeals in separate opinions, addressing errors in the order assigned by the respective appellant. We affirm Foster's convictions and sentences.

## II. FACTS

### 1. BACKGROUND

The following facts are relevant to Foster's appeal: Brothers Victor Henderson and Corey Henderson belonged to the "Pleasantview" or "PMC" gang in Omaha, Nebraska. Smith was a member of the rival "40th Avenue" gang.

Corey and Victor were federally indicted and agreed to plead guilty and testify for the government in exchange for more lenient sentencing. When they were released from federal prison in 2007, they were considered "snitches" within the gang community.

Following their release, Corey and Victor saw Smith at a party in October 2008. Smith told Corey: "We don't fuck with your kind." About 2 weeks before the shooting, Corey and Victor saw Smith again at an American Legion hall in Omaha (the Legion). The Legion is considered a bar for Corey and Victor's gang. Smith made another statement to the effect of "we don't mess with your kind."

On November 9, 2008, Corey, Victor, and several of their family members went to the Legion. While Corey and Victor were there, Smith and Foster entered the bar wearing hooded sweatshirts. Smith and Foster were in the Legion approximately 10 minutes, and before they left, they looked and nodded toward Corey and Victor.

Around closing time, Victor attempted to break up a fight in the parking lot of the Legion. Smith and Foster returned, and Corey and Victor were shot. The evidence was in conflict as to whether Foster or Smith was the shooter. Officers responded to the Legion and found a chaotic scene. Victor was fatally shot in the neck, and four others were wounded.

Within a month, Smith and Foster were arrested. Both were charged with one count of first degree murder, four counts of second degree assault, and five counts of use of a deadly weapon to commit a felony.

### 2. PRETRIAL MOTIONS

On April 9, 2010, over the objection of both defendants, the district court sustained the State's motion to consolidate. Later, the court sustained Smith's motion to sever, but subsequently

reconsolidated the trials. Before trial, both defendants again moved to sever, arguing that they would be required to “point the finger” at each other. The State asserted that it planned to prosecute the defendants based on a theory that they acted together. The court overruled both motions.

### 3. TRIAL TESTIMONY

Neither defendant testified at trial. Both defendants proceeded mainly by cross-examining witnesses called by the State. We summarize the relevant trial testimony below.

#### (a) Robert Wiley

Officer Robert Wiley received a call at 12:44 a.m. on November 10, 2008. Upon responding to the call, Wiley found Victor lying in blood with a gunshot wound to his neck.

At trial, Wiley testified that soon after arriving on the scene, he observed a woman screaming, “It was D-Wacc, it was D-Wacc.” The court sustained two of Smith’s objections and instructed the jury to disregard Wiley’s testimony about what the screaming individual said. Foster did not object to this testimony.

Later, the State asked Wiley to describe the demeanor of the person screaming and state what she said. Smith objected on hearsay and confrontation grounds, but Foster did not. The State claimed the statement fell under the excited utterance exception to the hearsay rule. Smith’s objection was overruled, and Wiley proceeded to testify that the party was screaming, “It was D-Wacc,” over and over again.

#### (b) Corey Henderson

Corey testified that he knew Smith as “D-Wacc.” He explained that he and Smith had grown up together, that there was a fairly close connection between Victor’s and Smith’s families, and that Victor had fathered children with Smith’s cousin. Victor and Smith were on good terms. Over Smith’s objection, Corey also testified that Smith had been a member of the 40th Avenue gang from the time Smith was approximately 13 years old up through the shooting. Corey explained that in 2003 and 2004, Corey and Victor were federally indicted. They cooperated with the federal government

and testified against members of Smith's gang in exchange for lighter prison sentences. As a result, Corey and Victor were labeled as "snitches" and received threats. Following their release from federal prison, Corey and Victor primarily associated with their family members and continued to associate with members of the Swift family.

Despite mainly associating with family, Corey testified that they saw Smith on several occasions before the shootings. In October 2008, Corey and Victor saw Smith at a party where, after Corey acknowledged Smith, Smith stated, "We don't fuck with your kind." At trial, Foster did not object to Corey's testimony about Smith's statement or request a limiting instruction.

Corey testified that he and Victor next saw Smith 2 weeks before the shootings. Corey and Victor went to the Legion, where Corey noticed Smith on the dance floor. They stayed only about 30 minutes. As Corey walked out, he saw that a group of males had surrounded Victor outside of a car, including Smith, "Don Don" Swift, and a boy of about 14, who each had a gun. "Don Don" was arguing with Victor. At some point, Corey heard Smith say, "We don't fuck with y'all kind. They ain't tripping off that other stuff. We just don't fuck with y'all kind." Corey understood this to be a comment about Corey and Victor's being "snitches." Foster did not object to this testimony about Smith's statements outside the Legion or request a limiting instruction.

On the night of November 9, 2008, Corey and Victor were at the Legion. While there, Corey saw Smith and Foster come into the Legion wearing hooded sweatshirts with the hoods pulled over their heads. Smith wore a black hooded sweatshirt. Foster wore a gray hooded sweatshirt, was light skinned, had braided hair, and walked with a limp. While at the Legion, Smith gave Corey a "hateful look or a stare." Corey also saw Smith and Foster looking and nodding toward him and Victor. After about 10 minutes, Smith and Foster left the Legion.

Later that evening, Victor attempted to stop a fight in the parking lot. When Corey noticed that Victor turned his head, Corey turned his head to see what caught Victor's attention. He

saw that Smith and Foster had returned and were only about 6 or 7 feet away. They had switched hooded sweatshirts. Smith was now wearing the gray hooded sweatshirt, and Foster was wearing the black hooded sweatshirt.

Corey testified, "I [saw] like a gesture and then I turned real quick and I could just see a flash." The gesture was "like maybe they [were] caught off guard, or it was a movement." Corey said that when Smith made the gesture, he did not see Smith with a gun. Corey saw "fire" and heard "a loud boom" coming from the direction of Foster, consistent with a "bigger handgun." Corey began to run between the cars in the parking lot, but he stopped because he had been shot in the leg.

During cross-examination by Foster, Corey testified that he picked Smith out of a photographic lineup but could not identify Foster. Foster later attempted to impeach Corey with his prior statements to police that he saw Smith hand Foster a gun and that Smith was wearing a black hooded sweatshirt. When Foster asked Corey whether he told police that "Don Don" had brandished a gun at Victor 2 weeks prior to the shooting, Corey responded, "I can't recall."

Smith similarly questioned Corey about the person referred to as "Don Don" who threatened Victor with a firearm. Smith also questioned Corey about testifying for the federal government and receiving threats from individuals other than Smith.

#### (c) Champagne Swift

Champagne Swift was at the Legion the evening of the shooting and saw Smith and another individual. She had not seen the individual with Smith before, but testified that he had a black hooded sweatshirt, light skin, and braids. When Smith and the individual with him left the bar, they went past the table where Corey and Victor were seated. Later, as Champagne was walking toward her mother's house, she heard shots.

#### (d) Martini Swift

At trial, Martini Swift testified that she saw Smith enter the Legion, but that she did not see anyone enter the Legion with Smith. Then, the State impeached Martini with her statement to police that Smith walked into the Legion with a "light-skinned boy" wearing braids and a gray hooded sweatshirt.

(e) Tameaka Smith

Tameaka Smith was in her van in the Legion parking lot when the gunshots began. She saw someone in a black hooded sweatshirt shooting a gun from either a crouching position or a shooter's stance. She said the shooter was skinny and taller than her. She testified she was about 5 feet 6 inches or 5 feet 7 inches tall.

During cross-examination, Foster elicited testimony from Tameaka that she did not consider Foster to be skinny. On cross-examination by Smith, Tameaka stated that she did not remember telling the police that the photograph the police showed her of Smith did not depict the person she saw. Neither did she remember if she saw someone next to the shooter.

(f) Tenisha Bennett

Tenisha Bennett was less than 5 feet from Victor as he was trying to break up the fight in the parking lot. When the shooting began, she turned and saw a person standing close to Victor and pointing a gun at him. The man with the gun was wearing a black coat with a hood pulled far over his face. It was possible someone else was standing next to the shooter, but the shooter seemed to be alone. Tenisha's look at the shooter was brief. She knew Foster, but stated that she did not see him at the Legion that evening.

(g) Jacqueline Edwards

Jacqueline Edwards testified that Smith was a friend of Victor's, but that Smith stopped associating with Victor after Victor's release from prison. The night of the shootings, she saw Smith come into the Legion wearing a black hooded sweatshirt. He was accompanied by a light-skinned male who was wearing a gray hooded sweatshirt and had his hair in two long pigtails. Jacqueline later identified the man accompanying Smith and wearing the gray hooded sweatshirt as Foster. As Jacqueline left the Legion on November 10, 2008, she heard five or six gunshots.

On cross-examination by Foster, Jacqueline testified that she had previously told the police who she thought had committed the shooting. The name she gave the police was not Foster's.

(h) Tamela Henderson

Tamela Henderson left the bar with Victor, Corey, and a few others. She was walking back toward the bar when she received a telephone call. As she walked and talked on her cell phone, she was forced to sidestep two men. She saw their faces; one was Smith, and the other was a person she had seen in the bar earlier. They were wearing the same hooded sweatshirts they had been wearing in the bar. Smith had a gun in his hand. She did not see Foster with a gun.

Tamela heard gunfire a few seconds later but did not see the shooter. She ran to the door of the bar, someone let her in, and she stayed until the gunshots stopped.

After the shooting, Tamela went to where Victor was lying. She recalled screaming, "It was D-Wacc," because Smith was "standing there with the gun, so I figured that it was him." She did not actually see the shooter. She told police that night that Foster was not the shooter.

On cross-examination by Foster, Tamela said that Smith had on the same dark-colored hooded sweatshirt as he wore inside the bar. The other person had on the light-colored hooded sweatshirt. She did not see the person in the light-colored sweatshirt with a gun.

During cross-examination by Smith, Tamela was asked about a statement she made to police in April 2007 which implicated Smith in a different shooting. She admitted she had not seen Smith commit the shooting in that incident.

(i) Tequila Bennett

Tequila Bennett was present when Smith and Foster came to the Legion. Smith wore a dark-colored hooded sweatshirt, and Foster wore a gray hooded sweatshirt. Foster took his hood off long enough for Tequila to see that he had braids in his hair.

Later, Tequila was with Tamela when Tamela had to sidestep Smith and Foster outside the bar. Smith and Foster were wearing the same hooded sweatshirts they had worn inside the bar. Smith was taking a gun from his waistband with his right hand. Tequila was at the front door of the bar when she heard gunshots. She looked back in the direction of the gunfire and saw Smith firing the gun. She did not see Foster fire a gun.

Smith impeached Tequila with statements she had previously made to police and statements she had made at a deposition. Foster did not request a limiting instruction.

(j) Terrance Edwards

Terrance Edwards was at the Legion 1 week before the shooting when Smith spoke to Victor. Terrance testified without objection that he heard Smith say to Victor, “[W]e don’t fuck with your kind.” At trial, Foster did not object to this testimony or request a limiting instruction.

On the night of the shooting, Terrance saw Smith and Foster come into the bar. Smith wore a black hooded sweatshirt and Foster wore a gray hooded sweatshirt. Foster walked with a limp. After leaving the bar, Terrance saw Victor stopping a fight. Smith and Foster arrived at the scene. Terrance testified that the two had switched hooded sweatshirts, so Smith wore the gray hooded sweatshirt, and Foster wore the black hooded sweatshirt. They were both wearing their hoods up.

Terrance watched as Foster shot Victor. Terrance ran between cars and saw Smith and Foster chasing Corey. Foster limped after Smith as the two ran away. Terrance then realized he had been shot.

On cross-examination by Smith, Terrance remembered telling police that the person wearing the black hooded sweatshirt had ponytails. Terrance told police he was sure that the shooter was the person with braids in the black hooded sweatshirt.

(k) Sandra Denton

Assistant U.S. Attorney Sandra Denton testified concerning a trial in which Smith testified he was a “40th Avenue Crip” and had been for 10 years. Over Smith’s objection, Denton stated that Smith testified that “gang members do carry guns and they do shoot them.” She testified that Smith said that “they do fire guns at each other.” Denton testified that Smith also said: “[I]f you were a snitch, it would be dangerous for you on the street.” Foster did not object to Denton’s testimony about Smith’s previous statements or request a limiting instruction.

(1) Christopher Spencer

Det. Christopher Spencer conducted approximately 26 interviews for the case. He testified that Smith told him that he was at the Legion by himself on the night of the shooting and that he “had nothing to do with that.”

Foster attempted to elicit impeachment evidence against Corey. When Smith cross-examined Spencer, he also attempted to impeach Corey.

4. JURY INSTRUCTIONS

Following closing arguments, the court instructed the jury. Outside the presence of the jury, the court asked the parties if they wanted to sequester the jury. Each of the parties replied that they did not request sequestration, and each of the defendants personally verified that they did not seek sequestration.

5. VERDICTS AND SENTENCES

The jury convicted both Smith and Foster on all counts. Both were sentenced to life imprisonment for first degree murder, 40 to 50 years’ imprisonment for use of a deadly weapon to commit murder, 4 to 5 years’ imprisonment for each assault, and 10 to 20 years’ imprisonment for each use of a deadly weapon to commit assault. Because the sentences were consecutive, Foster’s total sentence was life imprisonment plus 96 to 150 years. He received credit for 734 days served.

Foster appeals his convictions. We have a statutory obligation to hear all appeals in cases where the defendant is sentenced to life imprisonment. See Neb. Rev. Stat. § 24-1106(1) (Reissue 2008).

III. ASSIGNMENTS OF ERROR

Foster assigns that the district court erred in (1) failing to sever his trial from Smith’s and (2) allowing the jury to separate without obtaining a voluntary, knowing, and intelligent waiver of his right to sequester the jury.

IV. ANALYSIS

1. SEVERANCE OF TRIALS

Foster claims that the district court abused its discretion by failing to sever his trial from Smith’s.

## (a) Principles of Law

[1-3] There is no constitutional right to a separate trial. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). The right is statutory and depends upon a showing that prejudice will result from a joint trial. *Id.* The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced. *Id.* A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *Id.*

In Nebraska, the joinder of defenses is governed by Neb. Rev. Stat. § 29-2002 (Reissue 2008), which states, in relevant part:

(2) The court may order two or more . . . informations . . . to be tried together if the offenses could have been joined in a single . . . information . . . or if the defendants, if there is more than one, are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The procedure shall be the same as if the prosecution were under such single . . . information . . . .

(3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an . . . information . . . or by such joinder of offenses in separate . . . informations . . . for trial together, the court may order an election for separate trials of counts [or] informations . . . grant a severance of defendants, or provide whatever other relief justice requires.

[4] As this court has interpreted § 29-2002, [t]he propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.

*McPherson*, 266 Neb. at 723, 668 N.W.2d at 497.

The subsections of § 29-2002 governing joinder are similar to the federal rule for joinder found in Fed. R. Crim. P. 8(a)

and (b). The subsection of § 29-2002 allowing for severance is also comparable to the federal rule governing severance. See Fed. R. Crim. P. 14(a). Because of these similarities between the state and federal rules relating to severance of previously joined trials, we find federal case law to be instructive in determining when severance should be granted.

[5] Under federal case law interpreting rule 14(a), the federal equivalent of § 29-2002(3), a court “should grant a severance . . . only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Prejudice serious enough to meet this standard may occur “when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant,” when “many defendants are tried together in a complex case and they have markedly different degrees of culpability,” when “essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial,” or in other situations. *Id.*

[6,7] Under this rule, a defendant seeking severance must meet a high burden. When the parties are before a trial court, “it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.” 506 U.S. 540. Rather, to prevail on a severance argument, a defendant “must show ‘compelling, specific, and actual prejudice from [the] court’s refusal to grant the motion to sever.’” *U.S. v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008) (quoting *U.S. v. Saadey*, 393 F.3d 669 (6th Cir. 2005)). Stated another way, “a defendant must show that the joint trial caused him such compelling prejudice that he was deprived of a fair trial.” *U.S. v. Hill*, 643 F.3d 807, 834 (11th Cir. 2011). There is a preference for joint trials. See *Zafiro*, *supra*.

Even once prejudice is shown, a defendant is not entitled to severance. See *id.* The federal rule governing severance “leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts.” 506 U.S. at 541. “When the risk of prejudice is high,

a district court is more likely to determine that separate trials are necessary, but . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.” 506 U.S. at 539.

[8] On appeal, “[a] denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.” *U.S. v. Bauer*, 551 F.3d 786, 791 (8th Cir. 2008) (quoting *U.S. v. Noe*, 411 F.3d 878 (8th Cir. 2005)). An appellate court “will find such an abuse only where the denial caused the defendant ‘substantial prejudice . . . amounting to a miscarriage of justice.’” *U.S. v. O’Connor*, 650 F.3d 839, 859 (2d Cir. 2011) (quoting *United States v. Bari*, 750 F.2d 1169 (2d Cir. 1984)). The Eighth Circuit has found that the denial of a motion to sever will be reversed only when denying severance “‘resulted in severe or compelling prejudice.’” *U.S. v. Mann*, 685 F.3d 714, 718 (8th Cir. 2012) (quoting *U.S. v. Rimell*, 21 F.3d 281 (8th Cir. 1994)). “‘Severe prejudice occurs when a defendant is deprived of an appreciable chance for an acquittal’” that would have existed in a separate trial. *Id.* (quoting *U.S. v. Garrett*, 648 F.3d 618 (8th Cir. 2011)).

#### (b) Additional Facts

In February 2010, the State filed a motion to consolidate Smith’s and Foster’s trials. Smith and Foster both objected to consolidation, but the district court sustained the State’s motion. On April 9, it consolidated the trials.

Shortly thereafter, Smith moved to sever, and the district court granted severance. The court severed the trials because it was concerned that allowing testimony that Foster said Smith directed him to kill Victor would violate Smith’s right to confrontation. Foster could not be compelled to testify.

The State moved for reconsideration, claiming such evidence would not be presented. Upon this motion, the district court reconsolidated the cases for trial.

Before trial, both Smith and Foster moved to sever. Foster claimed both defendants would “point the finger” at each other. Smith claimed the defendants’ defenses were antagonistic, conflicting, and mutually exclusive. He argued that as a consequence, evidence would be presented in a joint trial

that would not be admitted in his separate trial. The court overruled the motions. Before the presentation of evidence, both defendants again moved to sever and both motions were overruled.

(c) Resolution

As noted above, under Nebraska law, we must consider two questions when determining the propriety of a joint trial: “whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.” *State v. McPherson*, 266 Neb. 715, 723, 668 N.W.2d 488, 497 (2003).

Foster does not argue that his and Smith’s trials were improperly consolidated. Neither do we find that the initial consolidation of the trials was error. The charges against both Smith and Foster relate to their alleged involvement in Victor’s death. Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated. *Id.* Accordingly, the charges against Smith and Foster could have been consolidated in a single information and the first requirement for joinder has been satisfied.

Foster attacks his joint trial with Smith by arguing that the second requirement for proper joinder was not satisfied, because he was prejudiced by the joint trial. In support of his claim that he was prejudiced by being tried jointly with Smith, Foster advances three arguments: (1) that his defense was irreconcilable with and mutually exclusive of Smith’s; (2) that the court admitted hearsay statements made by Smith that would have been inadmissible if Foster had been tried separately; and (3) that admitting Smith’s hearsay statements violated his right to confront the witnesses against him, because Smith did not testify at trial. We consider each argument in turn.

(i) *Mutually Exclusive Defenses*

[9] The existence of mutually antagonistic defenses is not prejudicial per se. See *Zafiro v. United States*, 506 U.S. 534,

113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Therefore, even a defendant who is arguing that the existence of mutually exclusive or antagonistic defenses resulted in prejudice entitling him or her to severance must meet the high burden of showing that “joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” 506 U.S. at 539.

This already “heavy burden” becomes “correspondingly heavier when, on appeal, [joint defendants] seek to demonstrate that the district court abused its discretion by declining to [grant severance].” *U.S. v. Daniels*, 281 F.3d 168, 177 (5th Cir. 2002). We find that Foster has not met this heavy burden on appeal of showing an abuse of discretion by the district court in not severing his and Smith’s trials due to their conflicting defenses.

In an attempt to show that the district court abused its discretion, Foster claims that his and Smith’s defenses were mutually exclusive and that this fact “in and of itself, ‘prevent[ed] the jury from making a reliable judgment about guilt or innocence.’” Brief for appellant at 25 (quoting *Zafiro*, *supra*). He argues that his and Smith’s defenses were mutually antagonistic because their joint trial was factually parallel to that of the codefendants in *U.S. v. Tootick*, 952 F.2d 1078 (9th Cir. 1991), in which case the Ninth Circuit determined that the existence of mutually exclusive defenses was so prejudicial as to require severance. We do not agree that Smith and Foster had mutually exclusive defenses sufficient to require severance under *Tootick* or any other precedent.

In *Tootick*, *supra*, a man was stabbed while drinking with two other individuals. The two men with whom the victim was drinking when stabbed became codefendants, one of which was Moses Tootick. At trial, each defendant blamed the other. Tootick claimed he was highly intoxicated or unconscious during the stabbing. The other defendant, Charles Frank, testified that he watched Tootick repeatedly stab the victim. The two codefendants were the only people present when the victim was attacked, and to acquit one defendant, the jury had to convict the other defendant. The Ninth Circuit concluded on appeal that the two codefendants’ defenses were

mutually exclusive. The Ninth Circuit explained its conclusion that the codefendants' defenses were mutually exclusive as follows:

Because only Frank and Tootick were present when [the victim] was attacked, and because there was no suggestion that [the victim] injured himself, the jury could not acquit Tootick without disbelieving Frank. Each defense theory contradicted the other in such a way that the acquittal of one necessitates the conviction of the other.

*Id.* at 1081.

Having found that the codefendants in *Tootick* had mutually exclusive defenses, the Ninth Circuit considered whether this fact entitled them to separate trials.

Ultimately, the Ninth Circuit found that Tootick and Frank had demonstrated sufficiently manifest prejudice from their mutually exclusive defenses to entitle them to separate trials. It rested this conclusion on "the number and types of prejudicial incidents that were not corrected by instructions from the court." *Id.* at 1083. It reversed both defendants' convictions.

[10] *Tootick* is one of the few federal cases in which mutually antagonistic defenses have been found to result in sufficient prejudice to require severance. See *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). On the whole, the federal circuit courts have repeatedly found that defenses that are based on "finger pointing" do not result in prejudice sufficient to mandate severance. See, e.g., *U.S. v. Dinkins*, 691 F.3d 358 (4th Cir. 2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 1278, 185 L. Ed. 2d 214 (2013); *Hardy v. Commissioner, Ala. Dept. of Corrections*, 684 F.3d 1066 (11th Cir. 2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 2768, 186 L. Ed. 2d 221 (2013); *U.S. v. Plato*, 629 F.3d 646 (7th Cir. 2010); *U.S. v. Lighty*, 616 F.3d 321 (4th Cir. 2010); *U.S. v. Nichols*, 416 F.3d 811 (8th Cir. 2005); *U.S. v. Blankenship*, 382 F.3d 1110 (11th Cir. 2004); *U.S. v. Hughes*, 310 F.3d 557 (7th Cir. 2002); *U.S. v. Johnson*, 297 F.3d 845 (9th Cir. 2002); *Fox v. Ward*, 200 F.3d 1286 (10th Cir. 2000); *U.S. v. Gilliam*, 167 F.3d 628 (D.C. Cir. 1999); *U.S. v. Throckmorton*, 87 F.3d 1069 (9th Cir. 1996). As the

Fourth Circuit has noted, “Hostility among defendants, and even a defendant’s desire to exculpate himself by inculpating others, do not of themselves qualify as sufficient grounds to require separate trials.” *Dinkins*, 691 F.3d at 369. “Blame-shifting on the part of the defendants ‘is not a sufficient reason for severance.’” *Nichols*, 416 F.3d at 817 (quoting *U.S. v. Basile*, 109 F.3d 1304 (8th Cir. 1997)). Neither does “[t]he fact that a defendant or his attorney is ‘a de facto prosecutor who will shift blame from himself to [co-defendants] justif[y] severance.” *Blankenship*, 382 F.3d at 1126 (quoting *U.S. v. Andreas*, 23 F. Supp. 2d 835 (N.D. Ill. 1998)). Rather, in order to be entitled to severance based on mutually exclusive defenses, “the defendant must show real prejudice, rather than merely note that each defendant is trying to exculpate himself while inculpating the other.” *Fox*, 200 F.3d at 1293.

We are not presented with a factual situation comparable to that in *U.S. v. Tootick*, 952 F.2d 1078 (9th Cir. 1991), such that we must conclude based on that case that Smith’s and Foster’s defenses were so mutually exclusive so as to entitle them to severance. The situation in the instant case is distinguishable because the jury was presented with a scenario where it could acquit one defendant based on his defense of innocence without simultaneously rejecting the defense of the other.

In *Tootick*, each defendant asserted his innocence and accused the other. Because no persons besides the two codefendants and the victim were present at the time of the stabbing, one of the defendants must have committed the stabbing. Thus, if the jury believed one defendant’s defense that he was innocent, such belief necessarily led to the conclusion that the other defendant’s defense was false and that he stabbed the victim. Once the jury believed one defendant’s defense, it was not required to find the other defendant guilty; it was precluded from believing both defendants’ claims of innocence, because one of them had to have stabbed the victim.

The same cannot be said of the current case, because the details of the shooting did not dictate that Smith or Foster were the only possible shooters. Instead, the jury could believe both Smith’s and Foster’s defenses that they did not commit the shooting and find that yet a third individual was the actor. In

short, unlike in *Tootick*, where the outcomes were limited to two, there were multiple outcomes in this case.

We first note that there was evidence implicating Foster as the shooter. At least two witnesses testified they saw Foster approach and shoot Victor. Corey saw Smith and Foster in the parking lot 6 to 7 feet away. At that time, Foster had on the black hooded sweatshirt and Smith wore the gray. Corey saw a gesture from Smith or that his hand was “going up.” About the same time, Corey saw “fire” from Foster’s hand and heard a loud boom. Terrance testified he saw Smith and Foster approach Corey and Victor. Smith and Foster had switched sweatshirts, and Foster wore the black hooded sweatshirt. He saw Foster with his hand out, and “fire” came from his hand when Terrance heard gunshots.

There was conflicting evidence that Smith committed the shooting. Specifically, Tequila claimed Smith was the shooter. Therefore, based on the testimony of either Corey and Terrance or Tequila, the jury could have convicted one defendant and acquitted the other. But these were not the sole possible outcomes of this case, as was the case in *Tootick*, *supra*.

There was also evidence to support the State’s claim that Foster shot Victor and that Smith aided and abetted Foster in the commission of the shootings. The State offered evidence that both defendants participated in the crime. It elicited testimony that Foster initially wore a gray hooded sweatshirt, but that he had switched sweatshirts with Smith by the time of the shooting so that he was wearing the black sweatshirt. At least one witness testified that the shooter was wearing black and was skinny. This evidence identified Foster as the shooter. Significantly, however, there was also evidence that Smith handed Foster the gun just before the shooting.

[11-13] Under the State’s theory of prosecution, the jury could evaluate the evidence as to each defendant. The fact that one codefendant was defending against the charge of aiding and abetting the other codefendant in committing the underlying crime does not necessarily create mutually exclusive defenses. Aiding and abetting is simply another basis for holding an individual liable for the underlying crime. See *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012). “By its terms,

[Neb. Rev. Stat.] § 28-206 [(Reissue 2008)] provides that a person who aids or abets may be prosecuted and punished as if he or she were the principal offender.” *Kitt*, 284 Neb. at 634, 823 N.W.2d at 192. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *Id.*

Smith was charged with first degree murder, but prosecuted on an aiding and abetting theory. As such, the jury could find him guilty without determining that he was the shooter. Indeed, the State offered evidence of each defendant’s individual role in the shooting. This evidence supported the conclusion that Smith handed the gun to Foster, who then shot the victims. Based on this evidence, the jury could have found both Smith and Foster guilty of the respective crimes with which they were charged.

There was also evidence adduced at trial that would support the opposite conclusion—that neither defendant was present at the time of the shooting. Smith and Foster were not the only persons present at the crime. And at trial, they suggested someone else could be responsible for the shooting, including “Don Don” or a person named “Views.”

Based on the evidence at trial, the jury could conclude that Foster committed the shootings alone, that Smith committed the shootings alone, that Smith and Foster committed the shootings together, or that neither Foster nor Smith committed the shootings. It could believe Foster’s defense that he was not the shooter without being compelled to find that Smith was the shooter. Likewise, the jury could believe Smith’s defense that he was not the shooter without necessarily having to find that Foster was the shooter. Thus, Smith and Foster did not have mutually exclusive defenses as defined in *U.S. v. Tootick*, 952 F.2d 1078 (9th Cir. 1991).

Neither were Smith’s and Foster’s defenses sufficiently antagonistic to merit severance under the more recent case law interpreting *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Recall that under *Zafiro*, only two kinds of real prejudice entitle a defendant to severance. The joint trial must either “compromise a specific trial right”

or “prevent the jury from making a reliable judgment about guilt or innocence.” 506 U.S. at 539.

Foster alleges that his and Smith’s joint trial was an example of a situation in which antagonistic defenses prevented a reliable jury verdict because “his trial became a contest between codefendants.” Brief for appellant at 35. Specifically, he argues that the joint trial reduced the State’s burden of proof by pitting Smith and Foster against each other. As examples of how this occurred, Foster points out the following facts: (1) Each defendant claimed the other was the shooter in opening statements; (2) Smith attempted to impeach Tequila and Tamela, both of whom provided testimony that implicated Smith and not Foster as the shooter; (3) both defendants used the testimony of Spencer to confirm testimony helpful to his case and impeach witnesses detrimental to his case; (4) Smith called a witness who saw a man with braids running from the scene; (5) both defendants “returned to their primary strategy of prosecuting each [other]” in closing arguments, *id.* at 31; and (6) the State exploited the contest between Smith and Foster in its rebuttal argument.

These facts do not, however, point out any aspect of Smith’s and Foster’s defenses other than that they constituted “finger pointing.” As previously noted, “finger pointing” alone does not create mutually exclusive defenses sufficient to require separate trials. See, e.g., *U.S. v. Dinkins*, 691 F.3d 358 (4th Cir. 2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 1278, 185 L. Ed. 2d 214 (2013); *Hardy v. Commissioner, Ala. Dept. of Corrections*, 684 F.3d 1066 (11th Cir. 2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 2768, 186 L. Ed. 2d 221 (2013); *U.S. v. Plato*, 629 F.3d 646 (7th Cir. 2010); *U.S. v. Lighty*, 616 F.3d 321 (4th Cir. 2010); *U.S. v. Nichols*, 416 F.3d 811 (8th Cir. 2005); *U.S. v. Blankenship*, 382 F.3d 1110 (11th Cir. 2004); *U.S. v. Hughes*, 310 F.3d 557 (7th Cir. 2002); *U.S. v. Johnson*, 297 F.3d 845 (9th Cir. 2002); *Fox v. Ward*, 200 F.3d 1286 (10th Cir. 2000); *U.S. v. Gilliam*, 167 F.3d 628 (D.C. Cir. 1999); *U.S. v. Throckmorton*, 87 F.3d 1069 (9th Cir. 1996).

Furthermore, this federal case law is consistent with Nebraska case law, which contains a similar principle. This court has held that “[t]he mere claim that defenses of codefendants are

antagonistic is insufficient reason to grant separate trials where the charges against all the defendants result from the same series of acts and would be proved by similar evidence.” *State v. Pelton*, 197 Neb. 412, 419, 249 N.W.2d 484, 488 (1977), *abrogated on other grounds*, *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996) (citing *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972)). Smith and Foster were both being tried for their involvement in the same shooting that occurred on November 10, 2008. Therefore, the mere claim of antagonistic defenses is not a sufficient reason for separate trials under either Nebraska or federal case law.

Aside from failing to establish the likelihood of an unreliable verdict, the facts identified by Foster also fail to demonstrate that the State’s burden was reduced by Smith’s and Foster’s conflicting defenses during the joint trial. Despite the fact that Smith and Foster both attempted to prove their own innocence by implicating each other, the State still adduced sufficient evidence for the jury to find Foster guilty of directly shooting Victor and Smith guilty for aiding and abetting Foster in the shooting. The evidence outlined above in our discussion of mutually exclusive defenses was more than sufficient to support guilty verdicts against both defendants.

Foster has failed to show that the State’s burden was decreased or that the jury’s verdicts were somehow unreliable due to the joint trial. And in his argument on mutually exclusive defenses, Foster does not allege that the joint trial violated any of his specific trial rights. Thus, he has failed to establish real prejudice resulting from his and Smith’s defenses as required by *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993).

Foster’s first argument does not persuade us that he was prejudiced by the joint trial or that the court abused its discretion in denying severance.

*(ii) Smith’s Statements as  
Inadmissible Hearsay*

In his next argument, Foster contends the district court admitted statements made by Smith that would have been inadmissible hearsay had Foster been tried separately. He claims

the court did not instruct the jury to consider these statements only as evidence of Smith's guilt.

a. Additional Facts

The first statement at issue was made by Smith at the party in October 2008. Corey testified that at the party, Corey saw Smith for the first time since Corey had been released from federal prison. After Corey acknowledged Smith, Smith said, "We don't fuck with your kind." Because of Smith's presence, Corey and Victor left the party after about 10 to 15 minutes. Foster did not object to Corey's testimony about Smith's statement or request a limiting instruction.

Smith made the second statement at issue 2 weeks before the shootings. Corey testified that he walked out of the Legion to find Victor standing outside their car surrounded by a group of men including Smith, several of whom had guns. Smith told Corey, "We don't fuck with y'all kind. They ain't tripping off that other stuff. We just don't fuck with y'all kind." Corey testified that he understood Smith to be commenting that he and Victor were "snitches." Terrance, who was also present, testified that he heard Smith say to Victor, "[W]e don't fuck with your kind." Foster did not object to any of this testimony or request a limiting instruction.

Smith made the final statements at issue during his trial testimony in a prior and separate proceeding. At the trial in the instant case, an assistant U.S. Attorney, Denton, testified that she prosecuted a case where Smith "testified that he was a 40th Avenue Crip and had been so for ten years." She also said that Smith made the following statements during his testimony in the prior proceeding: (1) that gang members carry and shoot guns; (2) that gang members fire guns at each other; (3) that it was a negative thing to be a "snitch"; and (4) that if you were a "snitch," it would be dangerous for you on the street. Foster did not object to Denton's testimony or request a limiting instruction.

b. Resolution

[14] For the purpose of clarification, we note that Foster does not assign that the district court erred in admitting

Smith's statements because they constituted hearsay in the context of the joint trial. Foster did not object when Corey, Terrance, and Denton testified at trial to Smith's statements. Neither did he request limiting instructions regarding their testimony. The failure to make a timely objection waives the right to assert prejudicial error on appeal. *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011). Because Foster did not raise a hearsay objection or request a limiting instruction regarding Smith's statements, he waived any argument that the statements were hearsay and that the court erred in admitting Smith's statements in the joint trial.

Consistent with this waiver, Foster does not argue that the admission of Smith's statements in the joint trial was trial error. Rather, Foster identifies the admission of the statements as proof that he was prejudiced by the joint trial. Foster argues that Smith's prior statements would not have been admitted if he were tried separately and that the court therefore abused its discretion in not severing the trials.

[15] The question before this court thus is whether the statements would have been admissible if Foster had been tried separately from Smith. Foster claims that they would not have been admissible in a separate trial because they would have been hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted . . . ." Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008). Hearsay statements are inadmissible under Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008). We do not agree with Foster, but find that Smith's statements would have been admissible against Foster in a separate trial.

*i. Smith's Statements to  
Corey and Victor*

[16] Smith's statements to Corey and Victor would not have been inadmissible in a separate trial under the hearsay rule because they were not offered for the truth of the matter asserted. An extrajudicial statement not offered to prove the truth of the matter asserted is not hearsay. *State v. Hansen*,

252 Neb. 489, 562 N.W.2d 840 (1997). Smith's statements to Corey and Victor would have been offered for their truth if they had been used to prove that Smith literally did not "fuck" with Corey and Victor's "kind." That was not the case. Rather, in the joint trial, the statements were offered to prove something other than their truth—Smith's then-existing state of mind—and were therefore not excluded by the hearsay rule for the reason that they were not hearsay. If the State had offered Smith's statements for the same purpose in a separate trial, the statements would not have been offered for the truth of the matter asserted and thus would not have been hearsay.

Other courts have also admitted out-of-court statements which showed the existing state of mind of the declarant. *State v. Davis*, 62 Ohio St. 3d 326, 581 N.E.2d 1362 (1991), involved the prosecution of a person employed to commit murder for hire. The court held the statement of the alleged employer of the defendant that he was going to "get even" with the victim, whom the employer believed had set him up for an arrest, was admissible to show the then-existing state of mind of the employer. *Id.* at 343, 581 N.E.2d at 1377. In *People v. Paintman*, 92 Mich. App. 412, 285 N.W.2d 206 (1979), reversed on other grounds 412 Mich. 518, 315 N.W.2d 418 (1982), the codefendant made threats against one of the homicide victims. The court held the codefendant's state of mind was relevant to his intent in killing the victims and therefore to the defendant's guilt as an aider and abettor.

In conclusion, given the purposes for which the State admitted Smith's statements to Corey and Victor, the statements did not constitute hearsay in the joint trial and would not have been hearsay in a separate trial. Smith's statements could have been used in a separate trial of Foster to show Smith's then-existing state of mind or to demonstrate that Smith and Foster did not randomly appear at the Legion and shoot five people, thereby completing the story that Smith aided and abetted Foster in the shootings. Because the statements would not have been hearsay when offered for such a purpose, they would not have been inadmissible in a separate trial.

*ii. Smith's Prior  
Trial Testimony*

Foster claims Denton's testimony regarding Smith's statements made in a prior trial would have been inadmissible in a separate trial. We agree that this testimony would have been inadmissible in a separate trial, but do not find that the admission of these statements showed that Foster was unfairly prejudiced by the joint trial.

Smith's testimony that he was a gang member, that gang members shoot guns at each other, and that it was dangerous on the street to be a "snitch" was offered for its truth and was hearsay with respect to Foster. As hearsay, this evidence would not have been admissible in a separate trial.

But the admission of these statements about gangs was not so unfairly prejudicial that the court abused its discretion in not severing the trials. We do not find manifest prejudice in the admission of Smith's prior trial testimony for two reasons. First, Smith's testimony from a previous trial did not mention or implicate Foster. Indeed, other witnesses testified to Foster's presence at the Legion and his involvement in the shooting. Other witnesses also provided testimony showing that Corey and Victor were "snitches" and that they had been threatened. Second, it is common knowledge that gang members have guns, that gang members use guns, and that it was dangerous to be a "snitch." For these reasons, the testimony of Smith's statements in a previous proceeding was not so manifestly prejudicial as to require that the defendants be tried separately.

*(iii) Confrontation Clause*

In support of his first assignment that the district court erred in not severing the trials, Foster argues that the joint trial resulted in prejudice because the admission of Smith's statements in the joint trial violated Foster's rights under the Confrontation Clause. He argues as follows: "Here, the district court's decision to force the defendants into a joint trial prejudiced Foster by compromising his constitutional right to cross-examine Smith concerning the hearsay statements introduced by the State." Brief for appellant at 38. As a joint defendant, Smith did not testify during the joint trial.

a. Principles of Law

[17] “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” U.S. Const. amend. VI. An appellate court reviews de novo a trial court’s determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court determined that the Sixth Amendment prohibited the admission of testimonial statements against an accused unless the person who made the statements was unavailable and the accused had a prior opportunity for cross-examination. Michael Crawford was accused of stabbing a man who allegedly attempted to rape his wife. Under police interrogation, Crawford’s wife made a statement indicating the victim did not have a weapon in his hand. Crawford’s wife did not testify because of marital privilege, but her statement was presented to the jury. The jury convicted Crawford of assault. Crawford had claimed self-defense at trial.

On appeal, the U.S. Supreme Court determined the Sixth Amendment barred admission of statements that were testimonial, absent unavailability of the witness and a prior opportunity for cross-examination. The Court did not give an exhaustive definition of a testimonial statement, but statements given as prior testimony at a preliminary hearing, testimony given before a grand jury, testimony in a former trial, and statements from police interrogations were clearly testimonial. The circumstances in which the statement was made were important in determining if the statement was testimonial. “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford*, 541 U.S. at 51. Applying these propositions to the facts in *Crawford*, the Court concluded that the statement of Crawford’s wife was testimonial because she made the statement while under police interrogation.

[18] Lower courts have generally determined that statements to friends, relatives, accomplices, and anyone outside the criminal justice system are not testimonial. See Ralph Ruebner & Timothy Scahill, *Crawford v. Washington, the Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 Loy. U. Chi. L.J. 703 (2005). For example, in *Billings v. State*, 293 Ga. 99, 745 S.E.2d 583 (2013), the Georgia Supreme Court determined that statements a codefendant made to his girlfriend were not testimonial. The codefendant made the statements more than 2 weeks before being arrested. The statements were not the product of law enforcement interrogation during an investigation intended to produce evidence for prosecution.

We have employed a similar analysis to determine when a statement is testimonial. See *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004). In *Vaught*, we noted that the U.S. Supreme Court provided three possible definitions of a testimonial statement: (1) materials, such as affidavits, where the defendant could not cross-examine and the declarant would reasonably expect the statement to be used for prosecution; (2) extrajudicial statements in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances leading an objective witness to reasonably believe the statement would be available for use at a trial.

#### b. Resolution

##### *i. Smith's Statements to Corey and Victor*

[19] A statement that is not intended for use in the prosecution of a crime and that law enforcement had no role in obtaining is not testimonial. See *id.* Smith did not anticipate that his statements at the October 2008 party and at the Legion 2 weeks before the shooting would be used in a criminal prosecution, and the federal government had nothing to do with the statements. Accordingly, these statements were not testimonial. Because these statements were not testimonial, the Confrontation Clause would not prevent the statements from

being admitted in either a separate trial of Foster or a joint trial of Smith and Foster.

*ii. Smith's Prior  
Trial Testimony*

Smith's statements made in a prior trial as related by Denton were testimonial and, therefore, subject to the Confrontation Clause. The term testimonial "applies at a minimum to prior testimony . . . at a former trial." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Denton testified to statements Smith made in a former trial, and the State was involved in producing the statements for prosecution. As such, the statements were testimonial.

Given that Smith's statements in a prior proceeding were testimonial, it was a violation of the Confrontation Clause to admit these statements unless Foster had a prior opportunity to cross-examine Smith. See *id.* Foster did not have an opportunity to cross-examine Smith about the statements. Therefore, admitting the testimonial statements in a separate trial of Foster would implicate the Confrontation Clause.

We conclude that although the statements implicated Foster's rights under the Confrontation Clause, their admission was not so prejudicial as to result in an abuse of discretion by the court in not severing the trials. To justify severance, a defendant must show compelling prejudice to the conduct of his or her defense resulting in fundamental unfairness. *U.S. v. Acosta*, 807 F. Supp. 2d 1154 (N.D. Ga. 2011). Smith's general statement that gang members have guns and use them was not specifically directed at Foster and was a fact that would have been known by the jury as a matter of common knowledge. To the extent Smith's prior trial testimony was specific to individuals in the instant case, we note that other witnesses testified that Smith was a member of the 40th Avenue gang, that Corey and Victor were "snitches," and that Corey and Victor had been threatened. For these reasons, we do not find that the admission of Smith's prior trial testimony was so prejudicial as to result in an abuse of discretion by the district court in not severing the trials.

(d) Conclusion

Foster has raised three arguments that the court abused its discretion in not severing the trials: (1) that his defense was mutually exclusive to that of his codefendant, Smith; (2) that evidence was admitted in the joint trial that could not be admitted against him in a separate trial; and (3) that evidence was presented in the joint trial that violated his right to confrontation. For the aforementioned reasons, we conclude that Foster's arguments are without merit.

2. JURY SEQUESTRATION

Foster alleges the district court erred in allowing the jury to separate after the case was submitted without first obtaining his intelligent waiver of his right to sequester the jury.

(a) Principles of Law

[20,21] Neb. Rev. Stat. § 29-2022 (Reissue 2008) states, in part: "When a case is finally submitted to the jury, [jury members] must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court." We have long held that a defendant can waive the right to sequester the jury. See *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946). In *State v. Robbins*, 205 Neb. 226, 232, 287 N.W.2d 55, 58 (1980), *overruled*, *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011), we established a rule regarding waiver of the statutory right to sequester:

In the absence of express agreement or consent by the defendant, a failure to comply with [§ 29-2022] by permitting the jurors to separate after submission of the case is erroneous; creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted.

In *Collins*, *supra*, we overruled *Robbins*' holding that a defendant's express agreement or consent is required to waive the right under § 29-2022 to sequester the jury. However, our ruling in *Collins* was prospective only. Foster was tried before *Collins* was decided, and the case at bar is governed by the rule from *Robbins*.

(b) Additional Facts

After the jury began its deliberations, the following colloquy occurred:

[The court]: With regard to sequestration of the jury, is there any — do you want the jury sequestered, [prosecutor]?

[Prosecutor]: No, Your Honor. Just by Nebraska statute and case law, it's a right that each defendant has and they have to formally waive it for it not to [be] an error.

THE COURT: [Foster's counsel]?

[Foster's counsel]: We do not seek sequestration of the jury, Your Honor.

THE COURT: [Smith's counsel]?

[Smith's counsel]: Judge, I spoke to . . . Smith about this and he does not wish to have the jury sequestered.

Is that correct, . . . Smith?

DEFENDANT SMITH: Uh-huh.

THE COURT REPORTER: Is that a yes?

[Smith's counsel]: Yes.

DEFENDANT SMITH: Yes.

THE COURT: All right. And that's correct, . . . Foster?

DEFENDANT FOSTER: Yes.

THE COURT: All right. As such, then the jury will not be sequestered.

(c) Resolution

Foster argues that the district court erred by failing to obtain an intelligent waiver of his right to sequester the jury before allowing the jury to separate. He contends that given our finding in *Robbins, supra*, that § 29-2022 protects more than a mere procedural right, a defendant's waiver of the right to sequester must be voluntary, knowing, and intelligent. He claims formal warnings are required. Basically, Foster alleges that because the district court did nothing to ensure his waiver was voluntary, knowing, and intelligent, it was clearly erroneous to accept the waiver.

The State argues that the district court specifically asked Foster whether he did not seek sequestration and that he replied

he did not, which satisfied *Robbins*' requirement of express agreement or consent. We agree with the State.

The district court asked Foster's attorney if he sought sequestration. It also asked Foster personally if it was correct that he did not seek sequestration. Foster replied that it was correct that he did not seek sequestration. This met the requirement of *Robbins* that the defendant expressly agrees to waive sequestration. We find no merit to Foster's second assignment of error.

## V. CONCLUSION

Because we find no merit to either of Foster's assignments of error, we affirm his convictions and sentences.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

HEAVICAN, C.J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.  
DARRIN D. SMITH, APPELLANT.  
839 N.W.2d 333

Filed November 15, 2013. No. S-10-1232.

1. **Trial: Joinder: Proof.** There is no constitutional right to a separate trial. The right is statutory and depends upon a showing that prejudice will result from a joint trial.
2. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
3. **Trial: Joinder: Juries.** A court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.
4. **Trial: Joinder: Proof.** To prevail on a severance argument, a defendant must show compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever.
5. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. A defendant must show that the joint trial caused him or her such compelling prejudice that he or she was deprived of a fair trial.

6. **Pleadings: Parties: Judgments: Appeal and Error.** A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.
7. **Trial: Joinder.** A defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately.
8. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
9. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
10. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
11. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
12. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
13. \_\_\_\_: \_\_\_\_\_. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
14. \_\_\_\_: \_\_\_\_\_. Where evidence of crimes is so blended or connected with the ones on trial so that proof of one incidentally involves the other or explains the circumstances, it is admissible as an integral part of the immediate context of the crime charged. Where the other evidence is so integrated, it is not extrinsic and therefore not governed by Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012).
15. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
16. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. An appellate court reviews for clear error the trial court's factual findings underpinning the excited utterance hearsay exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
17. **Rules of Evidence: Hearsay: Proof.** Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008), provides that hearsay is a statement, other than one

made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

18. **Rules of Evidence: Rules of the Supreme Court: Hearsay.** Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of the Nebraska Supreme Court.
19. **Rules of Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.
20. \_\_\_\_: \_\_\_\_\_. The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.
21. \_\_\_\_: \_\_\_\_\_. The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue.
22. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.
23. **Constitutional Law: Witnesses.** The Confrontation Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.
24. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
25. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
26. **Constitutional Law: Appeal and Error.** Violations of the Fourth Amendment are subject to harmless error analysis.
27. **Miranda Rights: Appeal and Error.** Violations of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are subject to a harmless error analysis.

28. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
29. **Motions for Mistrial.** A party must premise a motion for mistrial upon actual prejudice, not the mere possibility of prejudice.
30. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
31. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
32. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
33. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
34. **Constitutional Law: Trial.** While one or more trial errors might not, standing alone, constitute prejudicial error, their cumulative effect may deprive a defendant of his or her constitutional right to a public trial by an impartial jury.
35. **Speedy Trial.** Every person indicted or informed against for any offense shall be brought to trial within 6 months, as computed under Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012).
36. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis.
37. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
38. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Peder Bartling, of Bartling Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

Darrin D. Smith, pro se.

WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge.

WRIGHT, J.

## I. NATURE OF CASE

Darrin D. Smith was charged with one count of murder in the first degree, four counts of assault in the second degree, and five counts of use of a deadly weapon to commit a felony. His codefendant, Jeremy D. Foster, was charged with the same counts, and the two were tried jointly. The jury convicted both Smith and Foster on all counts, and they were each sentenced to life imprisonment plus 96 to 150 years. Smith and Foster perfected timely separate appeals to this court and assign different errors. We address their appeals in separate opinions. We affirm Smith's convictions and sentences.

## II. FACTS

### 1. BACKGROUND

Brothers Victor Henderson and Corey Henderson belonged to the "Pleasantview" or "PMC" gang in Omaha, Nebraska. The defendant, Smith, was a member of the rival "40th Avenue" gang. Corey had known Smith since Corey was 15. Smith and Victor were good friends.

Corey and Victor were federally indicted in 2003 and 2004, respectively. Both agreed to plead guilty and testify for the government in exchange for more lenient sentencing. When Corey and Victor were released from federal prison in 2007, they were considered "snitches" by their community in Omaha.

Following their release, Corey and Victor first saw Smith at a party in October 2008. Smith told Corey, "We don't fuck with your kind" or "we don't mess with your kind." About 2 weeks before the shootings, Corey saw Smith again at an American Legion Hall in Omaha (the Legion). The Legion is considered a bar for Corey and Victor's gang.

On November 9, 2008, Corey, Victor, and several of their family members went to the Legion. Smith and Foster entered the bar. Both were wearing hooded sweatshirts (hoodies). They were in the Legion a short time, and before they left, they looked and nodded toward Corey and Victor.

Around closing time, Victor attempted to break up a fight in the parking lot. Smith and Foster returned, and Corey and Victor were shot. The trial testimony was in conflict as to the identity of the shooter. Officers responded to the Legion and found a chaotic scene. Five people had been shot. Victor was fatally shot in the neck. Four others were wounded.

Smith and Foster were arrested later that month. They were both charged with one count of first degree murder, four counts of second degree assault, and five counts of use of a deadly weapon to commit a felony, and their cases were consolidated for trial.

## 2. TRIAL TESTIMONY

### (a) Robert Wiley

Officer Robert Wiley testified that he received a call at 12:44 a.m. on November 10, 2008. He found Victor lying in blood with a gunshot wound to his neck. Wiley observed a woman who was screaming and crying. Over Smith's objection, Wiley testified that Tamela Henderson was screaming, "It was D-Wacc, it was D-Wacc." Other testimony established that Smith is known as D-Wacc.

### (b) Corey Henderson

Corey testified that he saw two people wearing hoodies come into the Legion with the hoods over their heads. Corey said that he recognized the individual in the black hoodie as Smith. The second person was light skinned, had a braid, wore a gray hoodie, and walked with a limp. Corey testified that he had never seen the individual in the gray hoodie prior to that night. Corey later identified the individual in a gray hoodie as Foster.

While at the Legion, Smith gave Corey "a hateful look or a stare." Corey also saw Smith and Foster looking and nodding toward him and Victor. Smith and Foster left the Legion after about 10 minutes.

Later that evening, Victor attempted to stop a fight in the parking lot of the Legion. When Corey noticed that Victor turned his head, Corey turned to see what caught Victor's attention. He saw that Smith and Foster had returned and were only about 6 or 7 feet away. Smith and Foster had switched hoodies; Smith was now wearing the gray hoodie, and Foster was wearing the black hoodie.

Corey testified, "I [saw] like a gesture and then I turned real quick and I could just see a flash." The gesture was "like maybe they [were] caught off guard, or it was a movement." When Smith made the gesture, Corey did not see Smith with a gun. Corey then saw "fire" and heard "a loud boom" coming from the direction of Foster. Corey began running. Eventually, he could not run anymore because he had been shot in the leg. According to Corey, Foster was the only shooter.

At trial, Foster impeached Corey, because previously, Corey had told police that Smith had a gun and had handed it to Foster before the shooting. Corey had also told police he thought both Smith and Foster may have been shooting at him. The court instructed the jury three times that this evidence was to be used solely for impeachment.

#### (c) Champagne Swift

Champagne Swift was at the Legion that evening and saw Smith and Foster. She had not seen Foster before, but testified he wore a black hoodie, had light skin, and had braids. Smith and Foster left the bar a different way than they entered and went past Corey and Victor's table. Later, as Champagne was walking toward her mother's house, she heard shots.

#### (d) Tameaka Smith

Tameaka Smith was in her van in the parking lot when the gunshots began. She saw someone in a black hoodie shooting a gun from either a crouching position or a shooter stance. She said the shooter was skinny and taller than her. She testified she was about 5 feet 6 inches or 5 feet 7 inches tall. She did not recall whether someone had been next to the shooter.

(e) Martini Swift

Martini Swift saw Smith come in the bar by himself. She walked out of the bar with him for a cigarette. Smith left, and Martini lit a cigarette. She was one of the participants in the fight Victor attempted to stop in the parking lot. When Martini heard gunfire, she started to run. She did not see Smith outside the bar at the time of the shooting.

(f) Tenisha Bennett

Tenisha Bennett was less than 5 feet from Victor as he was trying to break up the fight in the parking lot. She turned and saw a person standing close to Victor and pointing a gun at him. The man with the gun was wearing a black coat with a hood pulled far over his face. It was possible someone else was standing next to the shooter, but the shooter seemed to be alone. Tenisha's look at the shooter was brief. She knew Foster and stated she did not see him that evening.

(g) Jacqueline Edwards

Jacqueline Edwards saw someone come into the bar with Smith. That person was light skinned, had two long pigtails, and wore a gray hoodie with the hood pulled up. Jacqueline was at a vehicle in the parking lot when she heard five or six gunshots.

(h) Tamela Henderson

Tamela Henderson left the bar at the same time as Victor, Corey, and a few others. She was walking back toward the bar when she received a telephone call. As she walked and talked on her cell phone, she was forced to sidestep two men. She saw their faces; one was Smith, and the other was a person she had seen in the bar earlier that evening. They were wearing the same hoodies they had been wearing in the bar. Smith had a gun in his hand. She did not see Smith's companion with a gun. Tamela heard gunfire a few seconds later. She did not see the shooter. She ran to the door of the bar, someone let her in, and she stayed until the gunshots stopped. She went to the parking lot and was screaming, "It was D-Wacc."

## (i) Tequila Bennett

Tequila Bennett was with Tamela outside the bar when Tamela had to sidestep Smith and Foster. Smith and Foster were wearing the same hoodies they had worn inside the bar. Smith was taking a gun from his waistband with his right hand. Tequila was at the front door of the bar when she heard gunshots. She looked back in the direction of the gunfire and saw Smith firing the gun.

## (j) Terrance Edwards

Terrance Edwards was at the Legion when Smith made a statement before the shooting. He testified that he heard Smith say, “[W]e don’t fuck with your kind.”

On the night of the shooting, Terrance saw Smith and Foster come into the bar. Smith wore a black hoodie, and Foster wore a gray hoodie. Foster walked with a limp. After leaving the bar, Terrance saw Victor stop a fight. Smith and Foster arrived at the scene. Terrance testified that the two had switched hoodies, so Smith wore the gray hoodie, and Foster wore the black hoodie. They were both wearing their hoods up.

Terrance saw Foster shoot Victor. Terrance ran between cars and saw Smith and Foster chasing Corey. Foster limped after Smith as the two ran away. Terrance then realized he had been shot. He told police he had a good look at the person with the black hoodie, who had ponytails or braids. He told officers Smith was the shooter, meaning that Smith masterminded the shooting.

## (k) Christopher Spencer

Christopher Spencer was a detective with the Omaha Police Department. He conducted approximately 26 interviews for the case. Spencer interviewed Smith and testified that Smith said he had been at the Legion by himself.

Before Foster began his cross-examination of Spencer, Smith requested a sidebar, where he moved to sever and for a mistrial on the basis that Foster would elicit impeachment evidence from Spencer that would not be admitted in a separate trial of Smith. Smith argued that the prejudice from the evidence would be so great that it could not be cured by a limiting instruction. The court overruled the motions.

On cross-examination of Spencer, Foster elicited impeachment evidence against Tameaka and Corey. When Smith cross-examined Spencer, he also attempted to impeach Corey and other witnesses. Spencer testified that Smith stated to police that he had nothing to do with the shooting. Spencer admitted he received contradictory accounts of the shooting from witnesses.

### 3. VERDICTS AND SENTENCES

The jury convicted both Smith and Foster on all counts. Both were sentenced to life imprisonment for first degree murder, 40 to 50 years' imprisonment for use of a deadly weapon to commit murder, 4 to 5 years' imprisonment for each assault, and 10 to 20 years' imprisonment for each use of a weapon to commit assault. Because his sentences were consecutive, Smith's total sentence was life imprisonment plus 96 to 150 years. He received credit for 729 days served.

Smith appeals. We have a statutory obligation to hear all appeals in cases where the defendant is sentenced to life imprisonment. See Neb. Rev. Stat. § 24-1106(1) (Reissue 2008).

### III. ASSIGNMENTS OF ERROR

Smith assigns the district court erred in (1) refusing to sever his trial from Foster's; (2) allowing the State to introduce evidence of gang membership and prior bad acts without a hearing pursuant to Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Cum. Supp. 2012); (3) allowing the State to introduce inadmissible hearsay evidence in violation of his right to confrontation; (4) overruling his motion to suppress a statement he made to law enforcement; (5) overruling his motions for mistrial; and (6) admitting an unfairly prejudicial autopsy photograph. Smith also claims (7) there was insufficient evidence to convict him and (8) the combination of errors requires reversal. In a pro se supplemental brief, Smith assigns that (9) his speedy trial rights were violated.

### IV. ANALYSIS

Smith and Foster assign different errors. Accordingly, we address their appeals in separate opinions. We consider the errors assigned by Smith in the order they appear in his brief.

### 1. SEVERANCE

Smith first alleges the district court erred in failing to sever his trial from Foster's.

#### (a) Principles of Law

[1] There is no constitutional right to a separate trial. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). The right is statutory and depends upon a showing that prejudice will result from a joint trial. *Id.* The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced. *Id.* A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *Id.*

The joinder of defendants is governed by Neb. Rev. Stat. § 29-2002 (Reissue 2008), which states, in relevant part:

(2) The court may order two or more . . . informations . . . to be tried together if the offenses could have been joined in a single . . . information . . . or if the defendants, if there is more than one, are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The procedure shall be the same as if the prosecution were under such single . . . information . . . .

(3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an . . . information . . . or by such joinder of offenses in separate . . . informations . . . for trial together, the court may order an election for separate trials of counts [or] informations . . . , grant a severance of defendants, or provide whatever other relief justice requires.

[2] As this court has interpreted § 29-2002, [t]he propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.

*McPherson*, 266 Neb. at 723, 668 N.W.2d at 497.

(b) Additional Facts

In February 2010, the State moved to consolidate Smith's and Foster's trials. Smith and Foster both argued against consolidation. Smith argued a joint trial would allow the State to present evidence against both defendants that was inadmissible against one defendant. The district court took the matter under advisement, and on April 9, it consolidated the trials.

Shortly thereafter, Smith moved to sever. He argued that if the State proceeded against Smith and Foster jointly, it could present evidence against Foster that would be inadmissible against Smith in an individual trial and that the prejudice could not be cured by a limiting instruction. He represented that witnesses would testify Foster said Smith told him to kill Victor. The court sustained Smith's motion to sever.

The State moved for reconsideration. It asserted it would not offer evidence against Smith that would be inadmissible in a separate trial. The district court subsequently issued an order reconsolidating the cases for trial.

Before trial, Smith filed an amended motion to sever. He alleged that the defendants had conflicting, antagonistic, and mutually exclusive defenses, that each would provide evidence the other committed the shooting, and that impeachment testimony would be admitted in a joint trial that would not be admitted in a separate trial of Smith. The district court took the matter under advisement and later overruled the motion. Before the presentation of evidence, both defendants again moved to sever and both motions were overruled.

(c) Resolution

As noted previously,

[t]he propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.

*State v. McPherson*, 266 Neb. 715, 723, 668 N.W.2d 488, 497 (2003). We address each of these questions in turn.

(i) *Consolidation*

The charges against both Smith and Foster relate to their alleged involvement in Victor's death. As Smith acknowledges, the charges in the amended information represent offenses of the same or similar character as those with which Foster was charged. Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated. *Id.* Accordingly, the charges against Smith and Foster could have been consolidated in a single information and the first requirement for joinder has been satisfied.

(ii) *Prejudice*

Despite the potential for proper consolidation, Smith contends that he was prejudiced by the joint trial. Primarily, Smith alleges that he was prejudiced because evidence was presented that would have been inadmissible in a separate trial against him. He also alleges that he was prejudiced by the joint trial because it allowed the State to engage in the collective prosecution of him and Foster and created a situation in which the State and Foster both adduced evidence implicating Smith in the crimes. Smith's argument identifies the practical implication of collective prosecution and the "two-against-one scenario" as allowing the State and Foster to introduce evidence against Smith that would otherwise not have been admitted in a separate trial. Brief for appellant at 21. Thus, all of Smith's arguments for prejudice essentially come down to the question whether the joint trial allowed for the admission of otherwise inadmissible evidence.

Under Fed. R. Crim. P. 14(a), like under § 29-2002, severance is allowed only upon a showing of prejudice. Because of this similarity between the state and federal rules relating to severance of previously joined trials, we find federal case law to be instructive in determining when there is prejudice such that severance should be granted.

[3] Under federal case law interpreting rule 14(a), a court "should grant a severance . . . only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable

judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Prejudice serious enough to meet this standard may occur “when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant,” when “many defendants are tried together in a complex case and they have markedly different degrees of culpability,” when “essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial,” or in other situations. *Id.*

[4.5] A defendant seeking severance must meet a high burden. When the parties are before a trial court, “it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.” 506 U.S. at 540. Rather, to prevail on a severance argument, a defendant “must show ‘compelling, specific, and actual prejudice from [the] court’s refusal to grant the motion to sever.’” *U.S. v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008) (quoting *U.S. v. Saadey*, 393 F.3d 669 (6th Cir. 2005)). Stated another way, “a defendant must show that the joint trial caused him such compelling prejudice that he was deprived of a fair trial.” *U.S. v. Hill*, 643 F.3d 807, 834 (11th Cir. 2011). There is a preference for joint trials. See *Zafiro*, *supra*.

Even once prejudice is shown, a defendant is not entitled to severance. See *id.* The federal rule governing severance “leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts.” 506 U.S. at 541. “When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.” 506 U.S. at 539.

As this federal case law highlights, a joint trial can prejudice a defendant in many ways other than allowing for the admission of evidence that would be inadmissible in separate trials. The U.S. Supreme Court has recognized multiple forms of prejudice that can result from joint trial discussions of

severance under rule 14(a), which is similar to the Nebraska statute that allows for severance. See *Zafiro*, *supra*.

However, we do not consider these other possible forms of prejudice, because Smith does not argue them on appeal. Unlike his codefendant, Smith does not argue that the joint trial reduced the State's burden of proof or that it created the possibility of an unreliable verdict. Rather, Smith argues only that the collective prosecution and the "two-against-one scenario" resulting from the joint trial allowed for the introduction of evidence that would not have been admissible in a separate trial. Brief for appellant at 21.

[6] On appeal, "[a] denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown." *U.S. v. Bauer*, 551 F.3d 786, 791 (8th Cir. 2008) (quoting *U.S. v. Noe*, 411 F.3d 878 (8th Cir. 2005)). An appellate court "will find such an abuse only where the denial caused the defendant 'substantial prejudice . . . amounting to a miscarriage of justice.'" *U.S. v. O'Connor*, 650 F.3d 839, 859 (2d Cir. 2011) (quoting *United States v. Bari*, 750 F.2d 1169 (2d Cir. 1984)). The Eighth Circuit has found that the denial of a motion to sever will be reversed only when denying severance "'resulted in severe or compelling prejudice.'" *U.S. v. Mann*, 685 F.3d 714, 718 (8th Cir. 2012) (quoting *U.S. v. Rimell*, 21 F.3d 281 (8th Cir. 1994)). "'Severe prejudice occurs when a defendant is deprived of an appreciable chance for an acquittal'" that would have existed in a separate trial. *Id.* (quoting *U.S. v. Garrett*, 648 F.3d 618 (8th Cir. 2011)).

As such, Smith has the burden of proving that he was severely prejudiced by the denial of severance. To meet this burden, Smith alleges only that he was prejudiced by the collective prosecution and the "two-against-one scenario" because it allowed for the introduction of evidence that would not have been admissible in a separate trial. Brief for appellant at 21.

[7] In the case of the joinder of offenses, "a defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately." *State v. Schroeder*, 279 Neb. 199, 213, 777 N.W.2d 793, 805 (2010). Smith argues that this principle

should also apply to the joinder of defendants. He contends that “[b]y logical extension . . . a defendant is prejudiced by the joinder of trials where the evidence relating to one defendant would be inadmissible in a trial of a codefendant. Such was the instant case.” Brief for appellant at 20.

We agree with Smith that he could have been prejudiced if evidence was in fact admitted in the joint trial that would have been inadmissible against him in a separate trial. In at least one previous case involving the joinder of defendants, we have held that joinder was not prejudicial error where the evidence to which the defendant objected would have been admissible in the trial of either defendant separately. See *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). But we do not find that the “[e]xamples of [p]rejudice” identified by Smith show that evidence was admitted at the joint trial that would have been inadmissible against him if separate trials had been held. Brief for appellant at 20. We consider in turn Smith’s examples of evidence that was allegedly admitted to his prejudice in the joint trial.

a. Foster’s Incrimination  
of Smith

Smith alleges that Foster’s defense of claiming that Smith, and not Foster, was the shooter proves that Smith was prejudiced by the joint trial. He provides examples of alleged prejudice resulting from Foster’s defense throughout the trial. Notably, each example relates to Foster’s adducing evidence against Smith in furtherance of Foster’s own defense. During a hearing on a pretrial motion in limine, Foster asked the court for an order allowing him to present Tamela’s statement identifying Smith as the shooter. Smith claims this shows that joinder forced Smith to defend against both the State and Foster, creating a “two-against-one scenario.” *Id.* at 21. According to Smith, Foster’s opening statement further showed that Foster’s defense was to “point[] the finger at Smith” by highlighting the evidence of certain witnesses. *Id.* at 22.

Smith cites other examples of Foster’s adducing evidence against Smith from the evidentiary portion of the

trial: (1) Foster's cross-examination of Wiley "regarding the physical characteristics of the shooting suspect being consistent with Smith rather than Foster," *id.* at 22; (2) Foster's impeachment of Corey with statements Corey made to the police about Smith's handing a firearm to Foster prior to the shooting; and (3) Foster's questioning of Tameaka that "brought forth evidence that the shooter's physical characteristics were consistent with Smith's physical appearance," *id.* at 24. Smith contends that these individual examples of Foster's defense prove Smith was prejudiced by the joint trial. We do not agree.

The fact that Foster and the State allegedly were both trying to implicate Smith as the shooter does not show that Smith was prejudiced by the joint trial. As noted previously, this scenario could lead to multiple forms of prejudice. Nonetheless, Smith argues solely that Foster's defense of "point[ing] the finger" prejudiced Smith by introducing evidence that would have been inadmissible if offered by the State in a separate trial. *Id.* at 22. Indeed, all of his examples of prejudice identify allegedly inadmissible evidence adduced by Foster during the joint trial. But, as we will explain below, every piece of evidence identified by Smith could have been introduced by the State in a separate trial. Thus, the joint trial did not allow for the admission of otherwise inadmissible evidence by allowing Foster to incriminate Smith as part of Foster's own defense.

#### *i. Tamela's Statement*

Smith claims prejudice because Foster filed a pretrial motion to allow him to introduce incriminating evidence against Smith in the form of Tamela's statement. Yet, Smith fails to explain why the State could not have adduced this same incriminating evidence against him in a separate trial. Although Foster, instead of the State, argued in pretrial for the admission of Tamela's statement as an excited utterance, the State could have made this same argument for the admission of Tamela's statement instead of Foster. Indeed, the State did adduce Tamela's statement at trial through Wiley and argued for its admission based on the excited utterance exception. We will address the

admissibility of Tamela's statement in Smith's third assignment of error. But assuming for the moment that Tamela's statement was admissible as an excited utterance, it would have been admissible against Smith whether Foster or the State introduced it and whether Smith was tried jointly with Foster or separately. Therefore, the fact that Foster planned to introduce Tamela's statement against Smith does not show that Smith was prejudiced by joinder.

*ii. Cross-Examination  
of Wiley*

Smith contends he was prejudiced because Foster attempted to elicit testimony from Wiley regarding the physical characteristics of the shooting suspect, which characteristics were allegedly consistent with Smith's being the shooter, not Foster. The district court sustained Smith's objection to this line of questioning, but he nonetheless argues that the occurrence shows that he and Foster were "working against each other's interests." Brief for appellant at 22. Ultimately, Smith's argument on this issue turns on the fact that he was forced to defend against incriminating evidence elicited by Foster, instead of by the State. Smith identifies no other adverse effects from Foster's adducing this evidence rather than the State.

Because Smith was successful in keeping out Wiley's testimony about the physical characteristics of the shooter, we find no prejudice from this incident. In a separate trial, the State could have attempted to adduce this testimony from Wiley and Smith could have objected on the same grounds as in the joint trial. Otherwise inadmissible evidence was not admitted due to joinder. Rather, inadmissible evidence was excluded as inadmissible. Smith did not prove that he suffered prejudice from Foster's cross-examination of Wiley.

To the extent that Smith's argument is an attempt to highlight the conflicting nature of his and Foster's defenses in the joint trial, we find this argument to be without merit. The mere claim that defenses of codefendants are antagonistic is insufficient reason to grant separate trials where the charges against all the defendants result from the same series of acts

and would be proved by similar evidence. *State v. Pelton*, 197 Neb. 412, 249 N.W.2d 484 (1977), *abrogated on other grounds*, *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996). Smith and Foster were both charged based on their alleged involvement in the shooting at the Legion. And given the State's theory that Smith aided and abetted Foster in the shooting, similar evidence could be used to prove that both were involved. Smith's and Foster's defenses, although conflicting, were not mutually exclusive, such that the jury could not acquit one of them, based on his defense, without convicting the other. Rather, based on the evidence, the jury could conclude that Smith committed the shootings alone, Foster committed the shootings alone, Smith and Foster committed the shootings together, or neither Smith nor Foster committed the shootings. The same evidence could be used to convict both Smith and Foster for their alleged involvement in the shootings. Therefore, the mere fact that Smith's defense conflicted with Foster's was not sufficient, under our existing case law, to mandate separate trials.

### *iii. Impeachment of Corey*

At trial, Foster impeached Corey with statements Corey made to the police about Smith's handing a firearm to Foster prior to the shooting and about whether Smith and Foster might both have been shooting at Corey. The district court admitted the evidence with a limiting instruction that the evidence was to be considered only to determine if Corey was a credible witness. The court also instructed the jury that it could not consider these statements as evidence that Smith had a gun and that impeachment referred only to challenges to the witness' memory.

[8] Smith claims that if he were tried separately, Corey would not have been impeached by Foster. But the same evidence used to impeach Corey in the joint trial would have been admissible as impeachment evidence against Corey in a separate trial of Smith. The district court issued multiple limiting instructions to the jury that the evidence was to be used only for impeachment. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at

its verdict. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). Accordingly, we presume that the statements elicited from Corey on cross-examination were used in the joint trial for purposes of impeachment and not as proof that Smith had a gun. This same evidence would have been admissible in a separate trial of Smith for the purpose of impeachment. Therefore, joinder did not prejudice Smith by allowing the presentation of this impeachment evidence.

*iv. Questioning of Tameaka*

Finally, Smith points to Foster's questioning of Tameaka as proof that he was prejudiced by a joint trial in which he was forced to defend against two parties. He claims that Foster elicited testimony from Tameaka that the shooter's height and weight were consistent with Smith.

In the case of this evidence, like all the other evidence identified by Smith, he has failed to show that Tameaka's description of the shooter would be inadmissible against him in a separate trial. Accordingly, he has not shown that he was prejudiced by the admission of her description in a joint trial.

*v. Conclusion as to  
Foster's Defense*

In summary, Smith argues that he was prejudiced by the joint trial for the reason that he was required to defend himself against evidence adduced by both Foster and the State. But Smith has not identified any evidence Foster could introduce against him that the State could not also introduce. And he does not provide any other explanation why Foster's defense prejudiced Smith. The fact that Foster introduced evidence incriminating Smith as part of his defense did not show that Smith was prejudiced by joinder.

*b. Collective Prosecution*

Smith argues that he was prejudiced by the joint trial because it allowed the State to collectively prosecute him and Foster. In support of this argument, he alleges that the State's opening statement "suggested to the jury that it could evaluate Smith and Foster collectively rather than assess their individual conduct when evaluating their culpability, if any."

Brief for appellant at 21. Smith also contends that joinder allowed the State to avoid electing which defendant committed which criminal act and, consequently, enabled the State to introduce “conflicting evidence” that could not have been introduced in a separate trial. *Id.* at 26. Considering only those arguments put forth by Smith, we find no prejudice to him in the alleged collective prosecution of him and Foster for three reasons.

First, the joint trial did not allow the State to collectively prosecute Smith and Foster without identifying the shooter, as Smith contends. The State argued to the jury that Foster was the shooter and that Smith aided Foster. It did not avoid deciding whether Smith or Foster was guilty. Rather, under the State’s theory that Smith aided and abetted Foster, both were guilty of independent acts.

Second, the district court clearly instructed the jury that the guilt of each defendant was to be considered independently. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

Third, despite having the burden of proving prejudice, see *id.*, Smith does not explain why the State’s conflicting evidence would be inadmissible in a separate trial. He merely points out that pieces of the State’s evidence conflict. The pieces of evidence Smith identifies as conflicting relate to various details of the shooting and are drawn from the testimony of multiple eyewitnesses. Not surprisingly, the eyewitness accounts do not agree on all details of the shooting. But such discrepancies do not have a bearing on admissibility. As we have previously noted, where “witnesses contradict[] each other,” it is “simply a matter of credibility.” *State v. Pierce*, 204 Neb. 433, 438, 283 N.W.2d 6, 9 (1979), *overruled on other grounds*, *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983). The conflicting nature of the eyewitness testimony alone does not make it inadmissible. In the absence of any other reason why the eyewitness testimony identified by Smith was inadmissible, we find that he has failed to prove prejudice from the State’s admission of such testimony at the joint trial.

(iii) *Conclusion  
as to Joinder*

For all of the aforementioned reasons, we find that Smith has failed to show he was prejudiced by joinder of his case with Foster's. As such, the district court did not abuse its discretion in deciding not to sever Smith's case from Foster's. Smith's first assignment of error has no merit.

2. RULE 404 EVIDENCE

Smith alleges the district court erred by admitting evidence of his gang membership and evidence of his prior acts without holding a hearing as required by rule 404(3). His challenges to the admission of evidence relate to two encounters involving Smith, Corey, and Victor in October 2008.

(a) Principles of Law

[9-11] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Id.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

[12-14] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Rule 404(2).

[Rule] 404(2) does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime . . . or if the other crimes or bad acts are necessary

for the prosecution to present a coherent picture of the charged crime.

*State v. Freemont*, 284 Neb. 179, 192, 817 N.W.2d 277, 290-91 (2012). Accord, *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[W]here evidence of crimes is so blended or connected with the ones on trial so that proof of one incidentally involves the other or explains the circumstances, it is admissible as an integral part of the immediate context of the crime charged. . . . [W]here the other evidence is so integrated, it is not extrinsic and therefore not governed by rule 404(2).

*State v. Aguilar*, 264 Neb. 899, 909-10, 652 N.W.2d 894, 903 (2002).

#### (b) Additional Facts

The State moved in limine to be allowed to introduce evidence about Smith's and Victor's gang affiliations. The State alleged that Smith was a member of the 40th Avenue gang, that Victor testified against 40th Avenue gang members, and that the gang consequently considered Victor a "snitch." The State asserted that this gang-related evidence would explain the relationship of the parties and would show motive, opportunity, and intent.

Conversely, Smith moved in limine for an order prohibiting the State from introducing evidence of gang affiliations and certain encounters involving him, Corey, and Victor. Smith contended that the encounters were sufficiently removed from the shooting to require a rule 404 hearing. The court overruled Smith's motion in limine with respect to the encounters, as well as Smith's motion to exclude evidence of gang activity.

At trial, the State sought to introduce testimony from Corey about an encounter with Smith at the house where the October 2008 party took place. Smith objected on relevance and rule 404 grounds. The court overruled Smith's objection and permitted Corey to testify about the confrontations before the shooting. The court ultimately concluded that the encounters

were evidence that provided a total picture of the charged crime, which was not subject to rule 404.

Corey then testified that he saw Smith during a party in October 2008 and that Smith said, “We don’t fuck with your kind” or “we don’t mess with your kind.” On cross-examination, Corey stated that prior to this incident, there had been no physical altercation between Smith and Victor or between Smith and Corey.

Corey testified to another encounter with Smith that occurred in the Legion parking lot in October 2008. While inside the Legion, Smith stared and glared at Corey. Outside the Legion, Smith said, “We don’t fuck with y’all kind. They ain’t tripping off that other stuff. We just don’t fuck with y’all kind.” Corey interpreted Smith’s remarks to refer to Corey and Victor’s cooperation with the federal government. In response to Smith’s remarks, Corey and Victor left the Legion.

#### (c) Resolution

Smith claims that Corey’s testimony of those encounters with Smith was subject to rule 404(2) and that a hearing should have been held according to rule 404(3). He claims the court overlooked the State’s previous arguments that the evidence was relevant to show motive, intent, and opportunity, and because the evidence was offered for those purposes, a hearing should have been held.

The State claims that Smith did not request a continuing objection during Corey’s testimony about the encounters and did not make a specific rule 404 objection to Corey’s testimony that Smith said “[w]e don’t mess with your kind.” Brief for appellee at 41. It claims Smith waived the right to assert prejudicial error on appeal. It asserts that the confrontations were intrinsic to the crimes and that without the evidence, the jury would be led to believe Smith and Foster randomly appeared and shot at people in the Legion parking lot. And because the evidence was inextricably intertwined with the crimes charged, the evidence was not rule 404(2) evidence and no rule 404(3) hearing was required.

Contrary to the State’s argument, we find that Smith’s objections to Corey’s testimony were sufficient to preserve this

issue for our review. But we do agree with the State that the encounters to which Corey testified were intrinsic evidence not subject to rule 404.

In *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006), the defendant argued that the act of burning a pickup a week after the murder was extrinsic to a murder charge. We stated that in determining whether conduct is intrinsic, what matters is whether the evidence is so closely intertwined with the charged crime that it completes the story or provides a total picture of that crime.

More recently, in *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010), the State presented evidence that the defendant threatened a child with harm if she reported him. Specifically, the State's evidence included testimony that the defendant threatened the victim with harm if she reported his conduct, the mother's testimony that the defendant threatened her and physically assaulted her if she did not bring the victim to the bedroom when he directed her to do so, and the mother's testimony that the defendant became sexually aroused while watching the victim administer a massage. The defendant claimed this evidence was inadmissible under rule 404(2). On appeal, we considered whether the evidence was intrinsic to the charged crimes of first degree sexual assault and third degree sexual assault of a child and concluded the State had a right to present this evidence as part of the factual setting of the crime. Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not part of the coverage under rule 404(2). *Baker, supra*.

In *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000), the defendant's neighbors and coworkers testified concerning statements the defendant made to them that he wanted to kill his ex-girlfriend. The defendant argued the statements were prejudicial evidence of prior bad acts under rule 404(2). Prior to trial, the State argued that rule 404 was inapplicable because the statements were relevant to only the murder case and were not evidence of any other crimes. The trial court concluded that rule 403 applied and held a pretrial hearing.

In *Canbaz*, we concluded the testimony was not evidence of prior unrelated bad acts under rule 404(2). The testimony was

relevant evidence that the defendant murdered his ex-girlfriend intentionally and with premeditation, and we determined that the trial court erred in concluding that rule 404(2) applied to the disputed testimony.

Similarly, evidence that Smith threatened Corey and Victor each time he saw them was part of the factual setting of the instant crimes and was necessary to present a coherent picture. Before Corey and Victor entered plea agreements with the federal government, Smith was friends with them. But the first time Smith saw Corey and Victor after their release from prison, in October 2008, Smith told them that he did not associate with their “kind.” Later, Smith made a similar remark to Victor at the Legion. These were the only two times Smith encountered Corey and Victor following their release from prison. Significantly, Smith threatened them each time. Within a few weeks, on November 10, Smith acted on that threat. Evidence of Smith’s previous encounters with Corey and Victor allowed the State to present a coherent picture of the eventual shooting. Without this evidence, it would appear to the jury that Smith, who was a friend of Corey and Victor, appeared at the Legion parking lot and aided and abetted in the random shooting of five people.

The evidence of the prior encounters was not used to establish that Smith had the propensity to shoot Corey and Victor, but instead, to establish that Smith threatened Corey and Victor during two separate encounters and finally acted upon those threats the night of November 10, 2008. Accordingly, the evidence was inextricably intertwined with the shooting and not subject to rule 404. The district court did not abuse its discretion in admitting this evidence. Smith’s second assignment of error is without merit.

### 3. TAMELA’S STATEMENT: “IT WAS D-WACC”

Smith claims that the district court erred in allowing testimony that Tamela said, “It was D-Wacc,” when the police encountered her at the scene of the shooting. Smith argues that this statement was hearsay not covered by the excited utterance exception and that admitting the statement violated his right to

confront the witnesses against him. We address each of these arguments in turn.

(a) Hearsay

(i) *Principles of Law*

[15,16] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection. *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012). We review for clear error the trial court's factual findings underpinning the excited utterance hearsay exception, resolving evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[17,18] Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008), provides that “[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted . . . .” Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of this court. Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008). Accord *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[19] A hearsay statement may be admissible if it qualifies as an excited utterance, which is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Neb. Evid. R. 803(1), Neb. Rev. Stat. § 27-803(1) (Reissue 2008). For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. *Pullens, supra*. The key requirement is spontaneity, which requires a showing the statements were made without time for conscious reflection. *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005).

[20,21] The underlying theory of the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. *Pullens, supra*. The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue. *Id.*

(ii) *Additional Facts*

At trial, Wiley testified that he encountered Tamela within 1 minute or less of arriving at the scene of the shooting. He stated that his attention was drawn to Tamela because “she was very upset, she was hysterical, and she was screaming.” Upon approaching Tamela, Wiley found her to be “inconsolable.” At trial, he was allowed to testify, over Smith’s hearsay objection, to what Tamela was screaming. He recounted that she was “screaming: It was D-Wacc, it was D-Wacc, over and over again.” Later in the trial, the State presented evidence that Smith was known as D-Wacc. On cross-examination, Wiley acknowledged that Tamela was uncooperative, though he explained this uncooperativeness as resulting from her emotional state. He described his attempts to question Tamela as follows: “[A]s I was asking her questions, it was kind of hard to keep her attention . . . because she was just that upset and that hysterical.” Tamela still provided the shooter’s race, gender, approximate age, and name. According to Wiley, it would have been obvious to Tamela that he was a police officer.

Following Wiley’s testimony and outside the presence of the jury, Smith renewed his objection to the testimony about Tamela’s statement. His main concerns were that the testimony violated his right of confrontation and that Tamela’s statement to Riley may be unreliable. The district court overruled the objection because it found that the statement was an excited utterance. It explained the ruling as follows:

As I understand[,], the testimony was that when [Wiley] approached [Tamela] she was . . . hysterical and screaming

that D-Wacc did it . . . . Thereafter, while he was trying to question her, . . . it was difficult for him to obtain information from her, although he obtained information from her thereafter.

But when he first came upon her, she was yelling the statement, and as such the Court found this is an excited utterance . . . .

The following morning, the court declined another request by Smith to reconsider this ruling, again noting that Wiley's testimony was that he heard Tamela scream the statement "without asking any questions or without any interrogation."

*(iii) Resolution*

Smith contends that Wiley's testimony as to Tamela's statement was hearsay. He contends the statement was not an excited utterance because it was not spontaneous, but was made to implicate Smith after conscious reflection. He concludes that Tamela had time for reflection because "the record clearly demonstrates that [she], in fact, made the statement to Wiley knowing that it was fabricated." Brief for appellant at 44.

Tamela's statement was made out of court and was offered as evidence that Smith committed the shooting. It was therefore offered for its truth. Because it was an out-of-court statement offered for its truth, it was hearsay. See rule 801(3). Accordingly, it was not admissible except as provided by rule or statute. See rule 802. The State argues that the statement, "It was D-Wacc," was an excited utterance. We agree.

There was sufficient evidence before the district court to conclude that Tamela's statement met the requirements for an excited utterance. First, Wiley testified that Tamela was at the scene of the shooting, which he described as "an extremely chaotic scene." She undoubtedly experienced a startling event by being present for the shooting. Second, Tamela's statement related to the startling event because it identified the shooter. Third, the statement was made while Tamela was under the stress of the shooting. Wiley testified that his attention was drawn to Tamela, out of the entirety of the chaos, within 1 minute of arriving at the scene. He described her as "very upset,"

“frantic,” and “hysterical.” As Wiley testified in court, she was crying inconsolably and could not focus on the questions he was asking because she was “that upset and that hysterical.” This evidence supports the conclusion that Tamela made the statement about Smith’s being the shooter while still under the stress of the shooting.

The record does not support Smith’s inference that Tamela had consciously reflected about the statement because she allegedly knew it was false when she said it. In the portions of the record cited by Smith, Tamela does not state that she fabricated the statement. Rather, the cited portions of the record correspond to Tamela’s testimony that she did not actually see Smith in the act of shooting, but that she “figured it was him.” Taken alone, this testimony might support a conclusion that Tamela consciously chose to tell Wiley that Smith was the shooter, particularly in light of the fact that she had previously accused him of shooting someone. However, shortly after the testimony cited by Smith, Tamela explained more fully that she thought Smith was the shooter because she saw him with a gun moments before the shooting. The record does not support a finding that Tamela consciously fabricated her statement that Smith was the shooter, but instead demonstrates that Tamela believed Smith was the shooter because of what she observed moments before the shooting. Per our standard of review, the State, with whom the district court sided on this matter, is entitled to every reasonable inference that can be drawn from the evidence. See *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011). We find that it is a reasonable inference from the entirety of the evidence surrounding Tamela’s statement that she did not intentionally fabricate her statement that Smith was the shooter.

Although the fact that Tamela did not actually see Smith in the act of shooting is significant, it does not affect whether her statement was properly admitted as an excited utterance. To the extent that the evidence reveals that Tamela may not have had sufficient foundation to conclude that Smith was the shooter, it relates to credibility. For purposes of our hearsay analysis, the question is whether Tamela’s statement was made without time for conscious reflection, not whether she was a credible

witness to the shooting. The aforementioned evidence supports the conclusion that Tamela was still under the stress of the shooting when making her statement.

We do not find clear error in the district court's conclusion that Tamela's statement was made after a startling event, in relation to the startling event, and while she was under the stress of the event. We affirm the court's decision to admit Wiley's testimony regarding Tamela's statement based on the excited utterance exception to hearsay.

#### (b) Confrontation Clause

Smith contends admission of Tamela's statement via Wiley violated his right to confront the witnesses against him. He argues that Tamela was not unavailable and that her statement, "It was D-Wacc," was testimonial under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The State argues that Wiley's testimony about Tamela's statement did not violate the Confrontation Clause of the U.S. or Nebraska Constitution because Tamela testified at trial.

##### (i) *Principles of Law*

[22] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. Amend. VI. The Nebraska Constitution provides, "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." Neb. Const. art. I, § 11. We have held that the analysis under article I, § 11, is the same as that under the Sixth Amendment to the U.S. Constitution. *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005).

##### (ii) *Resolution*

[23] We conclude there was no Confrontation Clause violation. There is no confrontation violation if the declarant

testifies at trial. See, *State v. Holliday*, 745 N.W.2d 556 (Minn. 2008); *People v. Argomaniz-Ramirez*, 102 P.3d 1015 (Colo. 2004). In *Crawford*, 541 U.S. at 59 n.9, the U.S. Supreme Court stated: “The [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”

Tamela testified at trial and explained her statement. Smith cross-examined her at trial about the statement. Admitting Tamela’s statement, “It was D-Wacc,” did not violate the Confrontation Clause of the U.S. or Nebraska Constitution. This assignment of error has no merit.

#### 4. STATEMENT TO LAW ENFORCEMENT

Smith assigns that the district court erred in denying his motion to suppress his statement to law enforcement. He claims admitting the statement violated his rights under the Fourth and Fifth Amendments.

##### (a) Principles of Law

[24] In reviewing a trial court’s ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013). Regarding historical facts, an appellate court reviews the trial court’s findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court’s determination. *Id.*

[25-27] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010). With regard to historical facts, we review the trial court’s findings for clear error. *Id.* Whether those facts suffice to meet the constitutional standards, however, is a question of law, which

we review independently of the trial court's determination. *Id.* Violations of the Fourth Amendment are subject to harmless error analysis. See *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996). Violations of *Miranda* are also subject to a harmless error analysis. See *State v. Andersen*, 213 Neb. 695, 331 N.W.2d 507 (1983).

#### (b) Additional Facts

One of the officers who investigated Victor's death, Eugene Watson, worked off duty as a nightclub security guard. He saw Smith at an afterhours club on November 23, 2008. He spoke to Smith and asked him to come to the Omaha police station. Smith agreed.

A uniformed officer took Smith to the station in a police cruiser, and Smith was placed in a small interrogation room. Because Smith was intoxicated and sleeping, Watson and Spencer tried to wake him so he could interact coherently. Watson testified that while Spencer was attempting to get biographical information, Smith said "something about . . . watching TV and also he went to [the] Legion alone." Smith had not yet received the *Miranda* warnings. Once he was given those warnings, he did not speak to detectives. Smith was subsequently arrested.

Before trial, Smith moved to suppress his statements, claiming that he was detained without a warrant, consent, or probable cause, that his statements were the product of custodial interrogation without a waiver of his *Miranda* rights, and that the statements were involuntary. The court overruled Smith's motion.

At trial, Spencer testified, over Smith's objection, to Smith's statement that "he was at the . . . Legion by himself." Spencer also testified that when Smith was told police wanted to talk to him about the shooting, he said, "I had nothing to do with that."

#### (c) Resolution

Smith contends that he was taken into custody without probable cause and that the State has not purged the taint of the Fourth Amendment violation. Smith claims he was in

custody because he was not free to leave during questioning, he did not initiate contact with the police, he did not want to talk, the interview was dominated by the police, and he was arrested immediately following questioning. He also claims he was interrogated by police. Smith contends the statement was involuntary because he was highly intoxicated, he did not have assistance of counsel, he was not advised that he had the right to counsel, and he was not advised that he was not required to make a statement and that any statement he made could be used against him.

The State contends that because Smith voluntarily accompanied the police for questioning, there was no Fourth Amendment seizure. It also contends there was probable cause to arrest Smith because several witnesses indicated he was one of the people responsible for Victor's death. It contends the statement was not the result of custodial interrogation because Smith's freedom was not limited in a significant way and he voluntarily accompanied the police to the station for questioning. It also contends Smith volunteered the statement that he was at the Legion alone. It argues Smith's actions and awareness as he spoke with detectives show the statement that Smith went to the Legion alone was not involuntary and that the statement was not rendered involuntary because Smith was intoxicated.

Alternatively, the State claims any error in admitting Smith's statement that he went to the Legion alone was harmless. The State argues that Smith did not confess to shooting anyone, several witnesses placed him at the scene, and the statement did nothing to support the State's theory.

We find that Smith's statements were not inculpatory. His statement that he had nothing to do with the shooting was a claim of innocence. It did not incriminate him. He also stated he was at the Legion by himself. Testimony from multiple other witnesses placed Smith at the Legion. Thus, the admission of Smith's statements was not prejudicial to Smith. Assuming without deciding that the statements should not have been admitted, their admission was harmless error. The jury's verdict was surely unattributable to Smith's statements to police, and any error in admitting the statements was harmless. See

*State v. Richardson*, 285 Neb. 847, 830 N.W.2d 183 (2013). Smith's fourth assignment of error has no merit.

#### 5. MOTIONS FOR MISTRIAL

Smith alleges the trial court erred in failing to sustain his motions for mistrial.

##### (a) Principles of Law

[28-30] Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court abused its discretion. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013). A party must premise a motion for mistrial upon actual prejudice, not the mere possibility of prejudice. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *Id.*

##### (b) Additional Facts

Smith moved for mistrial four separate times. His first motion was made when Foster's lawyer attempted to impeach Corey. At a sidebar, Smith's attorney renewed his motion to sever and, if the motion to sever was not granted, moved for a mistrial. The motions for severance and mistrial were overruled. Smith moved for a mistrial again during the testimony of Terrance. The court concluded the evidence would have been presented at Smith's separate trial and that a curative instruction could be provided, and denied the motion. Smith moved for a mistrial a third time before the cross-examination of Spencer. Smith claimed Spencer would testify to statements that would not be admitted against Smith in a separate trial. The motion was overruled, and the court instructed the jury that the statements were to be used solely for impeachment. Spencer testified that according to his report, Tameaka described the shooter as tall and in a kneeling position. Spencer also testified that Corey had previously said something "passed" between Smith and Foster. Smith moved for a mistrial a fourth time at the end of the State's case on the basis of the court's failure to sever the trials. The motion was overruled.

(c) Resolution

Smith contends that his motions for mistrial should have been granted because evidence was presented against him that would not have been presented against him in a separate trial. The State notes that several of the motions for mistrial were made before the challenged evidence was admitted and that Smith's motions for mistrial were made on the ground of severance. It claims Smith has not shown prejudice and the district court did not err in denying the motions for a mistrial.

Smith bases his motions for mistrial on evidence that he contends would not be presented if he were tried separately. We have rejected these arguments in concluding Smith was not prejudiced by joinder. Smith has not shown he was prejudiced, he has not shown he should have been granted a mistrial, and the district court did not err in denying the motions. His fifth assignment of error has no merit.

6. POST MORTEM PHOTOGRAPH

Smith assigns the district court erred in admitting a post mortem photograph of Victor.

(a) Legal Principles

[31] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[32] In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent. *Id.*

(b) Additional Facts

At trial, the court admitted a post mortem photograph showing the fatal wound to Victor's neck. Smith made a timely rule 403 objection, which was overruled.

(c) Resolution

Smith argues the district court abused its discretion in admitting a photograph depicting Victor's face with the fatal

wound. He contends that the court admitted other photographs showing Victor's injuries and that there was no legitimate need to introduce a photograph of Victor's face with the bullet wound. He claims the photograph was needlessly cumulative and unfairly prejudicial. The State points out that Smith challenges an exhibit that does not show Victor's face, and argues that the court did not err in admitting the exhibit Smith challenges.

Smith challenges the admission of exhibit 113, a photograph which depicts the bullet wound to Victor's neck without depicting his full face. Exhibit 111 is a photograph that does depict the bullet wound to Victor's neck along with his face. Smith objected to exhibit 113, but not exhibit 111, at trial.

We conclude the court did not err in admitting either exhibit 111 or exhibit 113. We have upheld admission of a photograph showing a decomposed body that had been burned before it was buried. See *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009). Admission of the photographs in the instant case showing the bullet wound and Victor's face was not unfairly prejudicial to Smith. His sixth assignment of error has no merit.

## 7. SUFFICIENCY OF EVIDENCE

Smith alleges the evidence was insufficient to convict him. He claims that the State's evidence was contradictory, such that to convict him the jury would have to select some evidence to believe and ignore other evidence.

### (a) Legal Principles

[33] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

(b) Resolution

Smith contends that given the contradictory evidence in the record, in order to convict him, a trier of fact would have to select certain evidence from the State's case to believe and ignore evidence that showed Smith was not involved. The State claims that the jury weighed, rather than ignored, evidence and that the jury could have found the essential elements of the crime beyond a reasonable doubt.

We agree with the State that the jury could determine which witnesses to believe. Furthermore, the State prosecuted Smith as an aider and abettor. It presented evidence showing that Smith went to the Legion with Foster, that Smith found Corey and Victor in the parking lot, and that upon a movement or gesture from Smith, Foster fired, killing Victor and wounding Corey and three others. Tamela also testified that Smith had a gun in his hand just prior to the shooting. Based on this evidence, a rational trier of fact could have found Smith guilty beyond a reasonable doubt. Smith's seventh assignment of error has no merit.

8. CUMULATIVE ERROR

Smith argues that the sum of all the errors in his trial requires reversal, even if any single error alone does not.

(a) Legal Principles

[34] We have recognized the doctrine of cumulative error in the context of a criminal jury trial, stating that "while one or more trial errors might not, standing alone, constitute prejudicial error, 'their cumulative effect was to deprive the defendant of his constitutional right to a public trial by an impartial jury.'" *Hradecky v. State*, 264 Neb. 771, 781, 652 N.W.2d 277, 286 (2002) (quoting *Wamsley v. State*, 171 Neb. 197, 106 N.W.2d 22 (1960)).

(b) Resolution

Smith contends that, taken together, the errors in the case were not harmless, but demonstrate he did not receive a fair trial, and that if the case were tried without the errors, there is a substantial likelihood the jury would have acquitted

him. The State contends that Smith's cumulative error argument lacks merit because none of his other alleged errors have merit.

We have determined that it was no more than harmless error to admit Smith's statements to law enforcement. Otherwise, we have found no merit to any of Smith's other assigned errors. Considering the evidence of Smith's guilt, we conclude that admitting Smith's statements did not deny Smith's constitutional right to a public trial by an impartial jury. Smith's eighth assignment of error has no merit.

#### 9. SPEEDY TRIAL

In a pro se supplemental brief, Smith claims a violation of his statutory and constitutional speedy trial rights.

##### (a) Legal Principles

[35] Smith has a statutory speedy trial right. Every person indicted or informed against for any offense shall be brought to trial within 6 months, as computed under Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012).

[36] Smith also has a constitutional speedy trial right. Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013). This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Id.* None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007). Rather, the factors are related and must be considered together with other circumstances as may be relevant. *Id.*

[37] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *Brooks, supra.*

(b) Additional Facts

The information in Smith's case was filed on January 9, 2009. On January 14, Smith filed a plea in abatement, which was overruled on December 24. He filed a motion to sever on May 28, 2010, which was granted on June 16. The court later reconsolidated the cases. On June 30, Smith waived his speedy trial rights from June 30 to September 27, and the court continued the trial from July 12 to September 27. Trial began on September 27.

(c) Resolution

Smith claims that the records and files before the court do not show any cause for the delay between the filing of the plea in abatement on January 14, 2009, and the hearing on December 2. He claims that there was no just cause for the delay and that his counsel was ineffective for failing to advise him of and protect his speedy trial rights.

We conclude that Smith has not shown a violation of his statutory speedy trial rights. Smith's statutory speedy trial period began to run when the information was filed against him on January 9, 2009. See § 29-1207(2). The State had 6 months, until July 9, to try Smith. See § 29-1207(1). Under § 29-1207(4)(a), a plea in abatement tolls the running of the statutory speedy trial period. Accordingly, the time period when the plea in abatement was pending, from January 14 to December 24, is not included. This added 11 months 10 days to the speedy trial clock. The State then had until June 19, 2010, to bring Smith to trial.

The speedy trial period was tolled again on May 28, 2010, when Smith filed his pretrial motion to sever. See § 29-1207(4)(a). The motion to sever was resolved by the court on June 16, extending the speedy trial period by 19 days, to July 8. On June 30, Smith waived his speedy trial rights and the trial was continued from July 12 to September 27. The trial began on September 27. Smith was brought to trial within the time required by statute. His statutory speedy trial rights were not violated.

The next question is whether Smith's constitutional speedy trial right was violated. Smith has not shown a long delay, an impermissible reason for that delay, or that he was prejudiced by a delay. Therefore, we conclude he has not shown a violation of his constitutional speedy trial rights. Smith's final assignment of error has no merit.

[38] In his pro se supplemental brief, Smith argues his counsel was ineffective, but he does not assign ineffective assistance of counsel as error. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013). Accordingly, we do not address Smith's ineffective assistance of counsel argument.

## V. CONCLUSION

For the reasons set forth, we affirm Smith's convictions and sentences.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

HEAVICAN, C.J., not participating.

CONNOLLY, J., concurring.

During two October 2008 incidents, Smith told Corey, "We don't fuck with your kind." The majority concludes that these incidents were "inextricably intertwined" with the charged crimes. So, the majority concludes that Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012) does not apply and that the district court did not err in admitting these incidents without a § 27-404(3) hearing. But the majority's application of the "inextricably intertwined" exception is overbroad and improperly loosens the exception from its moorings. In my view, these incidents fall under § 27-404(2) and the court therefore erred in admitting them without a § 27-404(3) hearing. I find this error harmless, however, and therefore concur in the majority's judgment.

## ANALYSIS

### ANALYTICAL FRAMEWORK

As the majority notes, § 27-404(2) states, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he or she acted in conformity therewith.” Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” When such evidence is admissible under § 27-404(2), before the court may admit it, the State must “prove[] to the court by clear and convincing evidence that the accused committed the crime, wrong, or act.”<sup>1</sup> And such proof must “first be made outside the presence of [the] jury.”<sup>2</sup>

But § 27-404(2) does not apply to evidence which is inextricably intertwined with the charged crime(s):

Section 27-404(2) does not apply to evidence of defendant’s other crimes or bad acts if the evidence is inextricably intertwined with the charged crime. This rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.<sup>3</sup>

We have recognized, however, that if interpreted too liberally, the inextricably intertwined exception is susceptible to abuse

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<sup>1</sup> § 27-404(3).

<sup>2</sup> *Id.*

<sup>3</sup> *State v. Freemont*, 284 Neb. 179, 192, 817 N.W.2d 277, 290-91 (2012). See, also, *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

and might circumvent certain procedural protections or admit evidence that § 27-404(2) was designed to exclude.<sup>4</sup>

Recognizing this tension between § 27-404(2) and the “inextricably intertwined” exception, we recently tried to clarify the boundary between the two. Specifically, in *State v. Ash*,<sup>5</sup> we noted that “[i]t is the close entanglement of the evidence [between the prior bad act and the charged crime] that creates the need to present evidence of facts that are inconsequential to proving the charged crime.” And we agreed with federal courts that have found evidence inextricably intertwined with the charged offense ““when both acts are part of a single criminal episode, or when the other acts were necessary preliminaries to the crime charged.””<sup>6</sup>

Similarly, in *State v. Almasaudi*,<sup>7</sup> we noted that inextricably intertwined evidence “is sometimes termed ““same transaction evidence.””” And we noted that the exception applies when

the acts were inextricably intertwined with the charged offense and committed as part of a continuing crime to carry out the same objective, in furtherance of the same crime spree, to conceal previous crimes, and when the conduct was necessary to show a coherent picture of the facts of the crime charged.<sup>8</sup>

#### APPLYING THE FRAMEWORK TO THE FACTS

Here, the record shows that each incident occurred sometime in October 2008, weeks before the charged crimes on November 10, 2008. The first incident occurred at an afterhours party,

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<sup>4</sup> See, *State v. Ash*, ante p. 681, 838 N.W.2d 273 (2013); *Freemont*, supra note 3 (citing *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010), cert. denied 562 U.S. 942, 131 S. Ct. 363, 178 L. Ed. 2d 234). See, also, *U.S. v. Gorman*, 613 F.3d 711 (7th Cir. 2010); *U.S. v. Bowie*, 232 F.3d 923 (D.C. Cir. 2000)).

<sup>5</sup> *Ash*, supra note 4, ante at 694-95, 838 N.W.2d at 283.

<sup>6</sup> *Id.* at 695, 838 N.W.2d at 283 (quoting 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 404.20[2][b] (Joseph M. McLaughlin ed., 2d ed. 2011) (citing federal cases)).

<sup>7</sup> *State v. Almasaudi*, 282 Neb. 162, 177, 802 N.W.2d 110, 124 (2011).

<sup>8</sup> *Id.*

during which Smith told Corey, “We don’t fuck with your kind.” Victor and Corey, feeling uncomfortable, stayed only 10 or 15 minutes and then left. The second incident occurred in the parking lot outside of the bar. Smith, “Don Don” Swift, and one other person surrounded Victor. Smith was not armed, but the other two had guns. “Don Don” got “in Victor’s face,” apparently because “he was upset about a girl.” Corey tried to get Victor out of there, and Smith again told Corey, “We don’t fuck with ya’ll kind.”

The majority concludes that the incidents were inextricably intertwined with the charged crimes and that therefore, § 27-404(2) does not apply. The majority reasons that the incidents were not used for impermissible propensity purposes, that they formed the factual setting of the crimes, and that they were necessary to present a coherent picture of the crimes.

But the record shows otherwise. First, the incidents did not form the factual setting of the crimes because both incidents occurred weeks before the charged crimes. Second, the prosecution did not need the incidents to present a coherent picture of the crimes. Without them, the following was clear from the record: Victor, Corey, and Smith were in rival gangs; Victor and Corey snitched on members of Smith’s gang; snitches were reviled in the community and were in danger; and many witnesses testified that Smith was at the bar and that he participated in the shootings. The State needed nothing more to present a coherent picture of the crimes. And the incidents were not otherwise inextricably intertwined (i.e., part of a single criminal episode or in furtherance of the same crime spree).

Instead, these two incidents were § 27-404(2) evidence. And had there been a § 27-404(3) hearing at which the State proved by clear and convincing evidence that the incidents had occurred, they likely would have been admissible. But because there was no such hearing, the district court erred in admitting evidence of these incidents.

#### HARMLESS ERROR

Although the district court erred in admitting the incidents without a § 27-404(3) hearing, I believe that error

was harmless. Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.<sup>9</sup> Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict in the questioned trial was surely unattributable to the error.<sup>10</sup>

Smith argues that such error was not harmless because “the State not only relied on [these incidents] (1) to establish Smith’s motive to kill Victor, but (2) to distinguish Smith from any other person—40<sup>th</sup> Avenue gang member or not—against whom Victor and Corey provided incriminating evidence to law-enforcement authorities.”<sup>11</sup> In other words, the State used these incidents to differentiate Smith from the rest of the community, in that although everyone disliked snitches, Smith was the only one that expressed hostile feelings related to snitching explicitly directed at the victims.

But these purposes were interrelated because the State used Smith’s motive as an intermediate inference to prove identity.<sup>12</sup> And there was other strong evidence identifying Smith as a party to the crime. Multiple eyewitnesses put Smith and Foster at the bar that night. Multiple eyewitnesses testified that Smith and Foster, before the shootings occurred, had come in the bar, with their hoodies pulled up, walked through the bar, and left. Because it was a rival gang’s bar, the most likely explanation for this conduct was to scope out the bar and identify their targets. Multiple eyewitnesses then identified Smith and Foster as shooting and killing Victor, and shooting and injuring Corey and three other people. Although the district court erred, I believe the error was harmless.

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<sup>9</sup> See *Freemont*, *supra* note 3.

<sup>10</sup> See *id.*

<sup>11</sup> Brief for appellant at 38.

<sup>12</sup> See 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 3:15 (rev. ed. 1999).

### CONCLUSION

I disagree with the majority's application of the "inexplicably intertwined" exception to the two October 2008 incidents which, I believe, fall under § 27-404(2). The court erred in admitting these incidents without a § 27-404(3) hearing. I conclude, however, that the error was harmless and therefore concur in the judgment.

STEPHAN and MILLER-LERMAN, JJ., join in this concurrence.

STEPHAN, J., concurring.

To the extent that both of Smith's statements to Corey in October 2008 can reasonably be understood as constituting threats, as the majority characterizes them, I agree with my concurring colleagues that they were subject to Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), but their admission under the "inexplicably intertwined" exception was harmless error.

I write separately only to note my view that the first of the statements, which unlike the second did not involve any display of weapons, was ambiguous and could also be reasonably understood to mean that Smith did not wish to have any involvement with Corey because he was a "snitch." So construed, I would not regard that statement as "[e]vidence of other crimes, wrongs, or acts" within the meaning of § 27-404(2). But its admission at trial would constitute, at worst, harmless error. Therefore, I concur in the judgment.

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GRIDIRON MANAGEMENT GROUP, LLC, APPELLANT, v.  
TRAVELERS INDEMNITY COMPANY, APPELLEE.

839 N.W.2d 324

Filed November 15, 2013. No. S-12-1129.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008, Cum. Supp. 2012 & Supp. 2013), may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
4. **Administrative Law: Presumptions: Proof.** When challenging the decision of an administrative agency, the presumption under Nebraska law is that the agency's decision was correct, with the burden of proof upon the party challenging the agency's actions.
5. **Contracts.** Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
6. \_\_\_\_\_. A contract is viewed as a whole in order to construe it.
7. **Administrative Law: Appeal and Error.** Where a correct result is based upon facts that have not been found by an administrative agency, an appellate court may not affirm on different grounds. But an appellate court is without power to affirm on a different ground only when doing so would usurp the administrative agency's role as a finder of fact or as a maker of policy, or would otherwise intrude upon the domain entrusted to the administrative agency.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Michael J. Mullen, of Burns Law Firm, for appellant.

Justin High, of Taylor, High & Younes, and CeCelia C. Ibson, of Ibson Law Firm, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

## I. INTRODUCTION

The district court, acting as an intermediate court of appeals under the Administrative Procedure Act, affirmed the decision of the director of the Department of Insurance. At issue on appeal is the appropriate experience modifier (XMod) to be used when calculating the premium owed by Gridiron Management Group, LLC (Gridiron), for its workers' compensation insurance. We affirm the decision of the district court.

## II. BACKGROUND

In 2007, Gridiron purchased the assets of the Omaha Beef indoor football team, owned by Omaha Beef, LLC. The purchase agreement indicated that Gridiron was purchasing

[t]he property and other rights . . . *including but not limited to: all trade names; websites; telephone numbers; football field and related equipment; merchandise; football equipment; uniforms and associated peripherals; lease assignment; pre-paid sales revenue for the [United Indoor Football] 2008 season; operating schedules; ticket holder information; advertising information; sponsorship information; profit and loss statements; office equipment; software; the United Indoor Football League franchise rights; furniture; fixtures; account receivables; leasehold improvements; records; and goodwill . . .*

Gridiron also agreed to assume a limited number of liabilities as set forth in an appendix attached to the agreement.

Gridiron is a Nebraska limited liability company formed for the primary purpose of purchasing and operating the Omaha Beef indoor football team. Following the purchase, Omaha Beef, LLC, remained an active corporation according to the Nebraska Secretary of State's office, but there is no evidence in the record as to whether Omaha Beef, LLC, continued to engage in business activity following the sale of the Omaha Beef football team.

During the first 3 to 4 months of ownership, Gridiron made several improvements to the operation of the team. First, it changed the location where practices were held, moving to a better-lit, safer facility. Unlike Omaha Beef, LLC, Gridiron required at least one, if not two, trainers to be at each practice. Gridiron also hired a full-time team chiropractor, mandated the use of knee braces at practice, and instituted weight training and nutrition programs for players. Gridiron hired a new head coach and increased the size of the coaching staff from two to five. Only a few of the players from the previous years' roster made the team for the 2008 season. Note that in addition to operating the Omaha Beef football team, Gridiron was involved in other business activities, notably the marketing of boxing matches.

In February 2008, Gridiron applied for workers' compensation insurance under the Nebraska Workers' Compensation Plan (NWCP). The NWCP provides a mechanism for purchasing

workers' compensation insurance for employers who cannot obtain such insurance on the open market. The State of Nebraska has contracted with Travelers Indemnity Company (Travelers) to act as carrier for the NWCP, and in such capacity, Travelers is required to provide insurance to every eligible employer who complies with the requirements of the plan and pays the premium. That premium is determined by the National Council on Compensation Insurance, Inc. (NCCI), in accordance with its "Manuals of Rules, Classifications, Rates and Rating Plans." The NCCI uses the "Experience Rating Plan Manual" to assign each applicant with an XMod to be used in calculating the premium. The XMod is based upon an applicant's workers' compensation claims experience—the higher the XMod, the higher the premium. A new business is assigned an XMod of "1.00," and an XMod is recalculated based on an insured's "eligible experience."

Gridiron argued that it was entitled to an XMod of "1.00," because it was a new entity with no claims experience. But the NCCI disagreed and determined that under rule 3-C-1(a), Gridiron was "combinable" with Omaha Beef, LLC, and that thus, the various XMod's assigned to Omaha Beef, LLC, for the relevant time periods must be transferred to Gridiron. An NCCI panel upheld the NCCI's decision, though it instead reasoned that Gridiron was a successor entity to Omaha Beef, LLC, under rule 3-C-1(a)(4).

Gridiron appealed to the Nebraska Department of Insurance. The department affirmed, concluding that (1) Gridiron had the burden of proof; (2) Gridiron was a successor entity to Omaha Beef, LLC; (3) the NCCI panel's decision finding "combinability in accordance with Rule 3-C" was correct; (4) the evidence failed to show that Gridiron and Omaha Beef, LLC, were separate and independent companies; and (5) the NCCI panel's determination of the XMod was correct. The department also found that the issue of unpaid premiums, raised by Travelers for the first time before the department, should be determined in a separate civil action.

Gridiron appealed to the district court, which affirmed. The district court concluded that Gridiron had the burden of proof, but had failed to meet that burden to show that it was not a

successor to Omaha Beef, LLC, under rule 3-C-1(a)(2) and (4). The district court reasoned that Gridiron was a successor to Omaha Beef, LLC, and that change in ownership resulted in the transfer of the workers' compensation rating for Omaha Beef, LLC, to Gridiron. Gridiron appeals.

Note that the district court found error in the department's determination that Gridiron had failed to show it was a separate and independent company from Omaha Beef, LLC, and further found that "this is not about combinability" and that Omaha Beef, LLC, and Gridiron are not combinable entities. Neither of these findings has been appealed.

### III. ASSIGNMENTS OF ERROR

On appeal, Gridiron assigns, restated and renumbered, that the district court erred in finding that (1) Gridiron had the burden of proof to show there was no "change in ownership" and (2) a "change in ownership" existed such that the XMod of Omaha Beef, LLC, should be transferred to Gridiron.

### IV. STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008, Cum. Supp. 2012 & Supp. 2013), may be reversed, vacated, or modified by an appellate court for errors appearing on the record.<sup>1</sup> When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.<sup>2</sup> In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.<sup>3</sup>

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<sup>1</sup> *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 811 N.W.2d 666 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

## V. ANALYSIS

### 1. BURDEN OF PROOF

Gridiron first assigns that the district court erred in finding that it had the burden of proof to show that the NCCI's XMod determination was incorrect and that there was no "change in ownership" under rule 3-C-1(a).

[4] When challenging the decision of an administrative agency, the presumption under Nebraska law is that the agency's decision was correct, with the burden of proof upon the party challenging the agency's actions.<sup>4</sup> Of course, in this case, the original decision being challenged was that of the NCCI and not the department. But we view this as a distinction without a difference. We conclude that the NCCI's determination, once affirmed by the department, is entitled to a presumption of correctness. And, as noted above, it is the burden of the party challenging that determination—here Gridiron—to show that the decision was in fact incorrect.<sup>5</sup>

Gridiron's first assignment of error is without merit.

### 2. RULE 3-C-1(a)

Gridiron next assigns that the district court erred in affirming the determination below that there was a "change in ownership" under rule 3-C-1(a) supporting the transfer of the XMod for Omaha Beef, LLC, to Gridiron. Gridiron instead contends that it is entitled to an XMod of "1.00," the XMod assigned to new entities without any claims experience. Travelers argues that the decision of NCCI transferring the XMod of Omaha Beef, LLC, to Gridiron was correct because the sale of the Omaha Beef football team from Omaha Beef, LLC, to Gridiron was a change in ownership as contemplated by rule 3-C-1(a).

The insurance policy between Travelers and Gridiron provides that "[a]ll premium[s] for this policy will be determined

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<sup>4</sup> See, e.g., *In re Application of United Tel. Co.*, 230 Neb. 747, 433 N.W.2d 502 (1988). See, also, *Salem Decorating v. Nat. Coun. on Comp. Ins.*, 116 Or. App. 166, 840 P.2d 739 (1992) (relying on general burden of proof as set forth under evidence code); *Tex. St. Bd. of Dental Exam. v. Sizemore*, 759 S.W.2d 114 (Tex. 1988).

<sup>5</sup> See, e.g., *In re Application of United Tel. Co.*, *supra* note 4.

by our manuals of rules, rates, rating plans and classifications.” And the agreement between Travelers and the State of Nebraska provides that the “rating systems and policy forms used by the Contract Carrier shall be those filed by the [NCCI] for use by all member insurers in Nebraska.”

Rule 3-C-1(a) of the NCCI’s experience rating plan manual states:

For purposes of this Plan, a change in ownership includes any of the following:

- (1) Sale, transfer, or conveyance of all or a portion of an entity’s ownership interest
- (2) Sale, transfer, or conveyance of an entity’s physical assets to another entity that takes over its operations
- (3) Merger or consolidation of two or more entities
- (4) Formation of a new entity that acts as, or in effect is, a successor to another entity that:
  - (a) Has dissolved
  - (b) Is non-operative
  - (c) May continue to operate in a limited capacity
  - (5) An irrevocable trust or receiver, established either voluntarily or by court mandate[.]

At issue on appeal are the definitions of change in ownership as set forth in rule 3-C-1(a)(2) and (4).

(a) Rule 3-C-1(a)(4)

On appeal, Gridiron argues that it is not a successor to Omaha Beef, LLC, under the principles of corporate law and that for this reason, there was no change in ownership under rule 3-C-1(a)(4). For its part, Travelers concedes that Gridiron is not a successor under the principles of corporate law, but suggests that Gridiron is framing the issue incorrectly and that the focus should not be on the corporate entity, but instead should be on “the risk to be insured.”<sup>6</sup>

[5,6] Familiar principles guide this court in its interpretation of the language of the manual, namely that where the terms of a contract are clear, they are to be accorded their

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<sup>6</sup> Brief for appellee at 28.

plain and ordinary meaning.<sup>7</sup> A contract is viewed as a whole in order to construe it.<sup>8</sup>

Under the terms of the NWCP, the contract carrier, Travelers, must utilize the ratings plans of the NCCI. And the policy between Travelers and Gridiron provides that the NCCI manuals will be used by Travelers. This court has held that the NCCI manuals are appropriately incorporated by reference into policies issued under the NWCP.<sup>9</sup>

To properly interpret rule 3-C-1(a), we must consider all of the relevant provisions of the NCCI's rating manual. Rule 3-E-1 provides that the "experience for any entity undergoing a change in ownership will be retained or transferred to the experience ratings of the acquiring, surviving or new entity unless specifically excluded by this Plan." Change in ownership is defined in rule 3-C as reprinted above. Rule 3-F-1 is entitled "Evasion of Experience Rating Modification" and provides:

Some employers may take actions for the purpose of avoiding an experience rating modification. Other employers may take actions for otherwise legitimate business reasons that nonetheless result in the improper application of an experience rating modification. Regardless of intent, any action that results in the miscalculation or misapplication of an experience rating modification determined in accordance with this Plan is prohibited. These actions include, but are not limited to:

- Failure to report changes in ownership according to Endorsement WC 00 04 14
- A change in ownership
- A change in combinability status
- Creation of a new entity
- Transfer of operations from one entity to another entity that is not combinable according to Rule 3-D

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<sup>7</sup> *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

<sup>8</sup> *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010).

<sup>9</sup> *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 734 N.W.2d 719 (2007).

- Misrepresentation on audits or failure to cooperate with an audit[.]

Rule 3-D deals with the combination of entities.

The general rule, then, provides that an experience rating is retained when an entity undergoes a change in ownership. As the language of rule 3-E-1 demonstrates, this rule is written broadly in that the rating transfers to the “acquiring, surviving or new entity.” A change in ownership is also defined broadly in rule 3-C-1 to encompass five different scenarios as disparate as a transfer of ownership interest, the purchase of assets, merger or consolidation, formation of a new entity, or a trust or receivership. There is nothing in the language of any of these rules that would suggest the definition of successor under corporate law principles comes into play here, as is argued by Gridiron. Rather, the rules suggest that a change in ownership is intended to be broadly defined to fit with the general rule that an experience rating will be retained.

And the language of rule 3-C-1(a)(4) itself lends further support to this conclusion. That rule provides that there is a “change in ownership” with the “[f]ormation of a new entity *that acts as, or in effect is,* a successor . . . .” (Emphasis supplied.) Plainly, this language does not limit situations involving a “change in ownership” to those in which one entity is actually a successor under corporate law. Instead, it also includes entities that are “in effect” a successor—clearly a broader definition.

We conclude that the sale of the Omaha Beef football team to Gridiron by Omaha Beef, LLC, is a “change in ownership” under rule 3-C-1(a)(4). Omaha Beef, LLC, was still an active corporation, but there was no evidence that it was conducting business—and it certainly was not operating the Omaha Beef football team. And Gridiron was a new entity that was “in effect . . . a successor” to Omaha Beef, LLC, because, like Omaha Beef, LLC, before it, Gridiron’s business was operating the Omaha Beef football team. And because Gridiron was a successor under rule 3-C-1(a)(4), there was a “change in ownership” sufficient to permit the transfer of the XMod for Omaha Beef, LLC, to Gridiron.

## (b) Rule 3-C-1(a)(2)

In addition, we conclude that the district court was correct in finding there was a change in ownership under rule 3-C-1(a)(2). In its appeal of this finding, Gridiron argues that the district court erred in finding a change in ownership under rule 3-C-1(a)(2). Gridiron argues that because the NCCI did not rely on rule 3-C-1(a)(2), the district court erred in doing so. Gridiron further argues that even if the district court properly relied upon rule 3-C-1(a)(2), that definition was not met, because Gridiron did not take on the operations of Omaha Beef, LLC.

We disagree with Gridiron that there was no change in ownership as defined under rule 3-C-1(a)(2). Rather, we find it clear that under rule 3-C-1(a)(2), there was a change in ownership. It is undisputed that Gridiron was formed for the purpose of purchasing and operating the Omaha Beef football team. The purchase agreement clearly states that Gridiron is purchasing the assets of Omaha Beef, LLC, and includes a laundry list of assets, most notably including the United Indoor Football League franchise, the trade name “Omaha Beef,” and the goodwill of the Omaha Beef football team. While the purchase agreement does not specifically indicate that Gridiron is purchasing all assets, it also does not exclude any assets from the sale and the parties do not contend that some assets were excluded from the sale. Finally, Gridiron, as a new entity, has taken over the operations of Omaha Beef, LLC: what Omaha Beef, LLC, did—running the Omaha Beef football team—is instead now done by Gridiron. We reject Gridiron’s assertions to the contrary.

Nor are we persuaded by Gridiron’s assertion that the district court, and now this court, cannot rely on rule 3-C-1(a)(2) to find a change of ownership in this case because the NCCI failed to do so. Gridiron cites no authority to support this contention, and accordingly, we reject it. But even if we construe Gridiron’s argument broadly and presume that Gridiron is arguing that this court and the district court can judge the administrative record of the department only on the grounds upon which it was made and not on any other, we still find it to be without merit.

We addressed this issue in *Farmland Foods v. State*.<sup>10</sup> There, the plaintiffs argued that this court could not affirm the decision of the State Tax Commissioner on grounds different than those relied upon by the commissioner in his order. The plaintiffs contended that to do so would be to violate the “‘cardinal principle of administrative law,’” as set forth by the U.S. Supreme Court in *Securities Comm’n v. Chenery Corp.*,<sup>11</sup> namely, that the “‘grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based and no others.’”<sup>12</sup>

[7] But we explained that the plaintiffs were misconstruing this “‘cardinal principle.’”<sup>13</sup> We explained that where the correct result was based upon facts that had not been found by the administrative agency, an appellate court could not affirm on different grounds.<sup>14</sup> But,

[s]ubsequent decisions from other courts have held that an appellate body is without power to affirm on a different ground only when doing so would usurp the agency’s role as a finder of fact or as a maker of policy, or would otherwise intrude upon the domain entrusted to the administrative agency.<sup>15</sup>

In *Farmland Foods*, we ultimately declined to reach the issue of whether we could affirm on grounds different from those cited by an administrative agency. However, we decided the case on similar grounds: “No rule of law precludes this court from affirming an agency decision stating a correct reason and correct facts simply because a portion of those facts was not explicitly connected with the agency’s correct reason.”<sup>16</sup>

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<sup>10</sup> *Farmland Foods v. State*, 273 Neb. 262, 729 N.W.2d 73 (2007).

<sup>11</sup> *Securities Comm’n v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

<sup>12</sup> *Farmlands Foods*, *supra* note 10, 273 Neb. at 268, 729 N.W.2d at 79.

<sup>13</sup> *Id.*

<sup>14</sup> *Farmland Foods*, *supra* note 10.

<sup>15</sup> *Id.* at 270, 729 N.W.2d at 79.

<sup>16</sup> *Id.* at 270, 729 N.W.2d at 79-80.

We find *Farmland Foods* helpful to our disposition here. The department's order, while somewhat unclear, made the correct findings of fact to support a change in ownership under rule 3-C-1(a)(2), discussed that section, and essentially concluded that it had been met. The order simply failed to note that finding in its conclusions of law section of the order.

We therefore conclude that in addition to the change in ownership under rule 3-C-1(a)(4), there was a change in ownership under rule 3-C-1(a)(2) due to the asset sale and taking over of the business operations of Omaha Beef, LLC, by Gridiron. While this was not a basis for the department's decision, it is supported by the findings made by the department.

Gridiron's second assignment of error is without merit.

## VI. CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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FIRST EXPRESS SERVICES GROUP, INC., APPELLEE, V. ARLENE  
A. EASTER AND MARK T. EASTER, APPELLANTS,  
AND MILLER SERVICES AGENCY, INC., DOING  
BUSINESS AS DAVIDSON INSURANCE AND  
REAL ESTATE, APPELLEE.  
840 N.W.2d 465

Filed November 22, 2013. No. S-12-304.

1. **Summary Judgment: Moot Question: Appeal and Error.** The denial of a summary judgment motion generally becomes a moot issue on appeal after a final trial on the merits.
2. **Judgments: Verdicts: Appeal and Error.** In reviewing rulings on motions for directed verdict and judgments notwithstanding the verdict, an appellate court gives the nonmoving party the benefit of all evidence and reasonable inferences in his or her favor, and the question is whether a party is entitled to judgment as a matter of law.
3. **New Trial: Appeal and Error.** Regarding motions for new trial, an appellate court will uphold a trial court's ruling on such a motion absent an abuse of discretion.
4. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

5. \_\_\_\_\_. Generally, an appellate court disposes of a case on the theory presented in the trial court.
6. \_\_\_\_\_. When a party raises an issue for the first time on appeal, an appellate court will disregard it because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
7. **Trade Secrets: Restrictive Covenants.** Courts are reluctant to protect customer lists to the extent that they embody information that is readily ascertainable through public sources. Only where time and effort have been expended to identify particular customers with particular needs or characteristics will a list be protected. Such lists are distinguishable from mere identities and locations of customers that anyone could easily identify as possible customers.
8. **Breach of Contract: Unjust Enrichment.** A party cannot be liable for both breach of contract and unjust enrichment for the same conduct.
9. \_\_\_\_\_. There is no question regarding the priority of a claim for breach of contract and a claim for unjust enrichment flowing from the same conduct; liability under a contract displaces liability under an unjust enrichment theory.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed in part as modified, and in part reversed.

Matthew D. Hammes, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant Arlene A. Easter.

Abbie J. Widger and Cameron E. Guenzel, of Johnson, Flodman, Guenzel & Widger, for appellant Mark T. Easter.

Heather Voegelé-Andersen and David A. Yudelson, of Koley Jessen, P.C., L.L.O., for appellee First Express Services Group, Inc.

HEAVICAN, C.J., WRIGHT, CONNOLLY, and McCORMACK, JJ., and MOORE, RIEDMANN, and BISHOP, Judges.

CONNOLLY, J.

## I. SUMMARY

Arlene A. Easter sold crop insurance for First Express Services Group, Inc. (First Express). In 2009, however, Arlene resigned from First Express and went to work for her son, Mark T. Easter, a part owner of a competing agency. When she resigned, Arlene took a First Express customer list and transferred many of First Express' customers to Mark's agency. When First Express discovered this, it sued Arlene for breach

of contract and it sued Arlene, Mark, and Mark's agency for misappropriation of trade secrets and unjust enrichment. A jury found for First Express on all claims. Arlene and Mark (but not Mark's agency) appealed. The primary issues are (1) whether Arlene preserved for review her arguments challenging the enforceability of the underlying contract, (2) whether the customer list was a trade secret, and (3) whether the theory of unjust enrichment applied.

We will explain our holding with specificity in the following pages, but, briefly stated, it is as follows:

- Arlene did not challenge the enforceability of the underlying contract in the district court, so she cannot do so now for the first time on appeal.
- The customer list was not a trade secret, because the customers' identities and contact information were ascertainable from public sources and because the other information on the list was also ascertainable by proper means.
- The theory of unjust enrichment could not apply to either Arlene or Mark. Arlene is already liable for breach of contract, and the corporate veil protects Mark.

Therefore, Arlene is liable only for the portion of the judgment attributed by the district court to the breach of contract claim, which is \$360,121.72 (after applying the setoff of \$5,759.28). We modify the judgment against her accordingly. And because Mark is not liable for either misappropriation of trade secrets or unjust enrichment, we reverse the judgment against Mark.

## II. BACKGROUND

In 1979, Arlene began selling crop insurance, on her own. In 1986, she began working full time at the Otoe County National Bank in Nebraska City, Nebraska, but continued selling crop insurance independently as Arlene Easter Insurance. In 1990, Grant Gregory purchased the bank (through a holding company) and kept Arlene on as a bank employee. Gregory also hired her as an independent crop insurance agent for First Express, which opened an office in the bank. Arlene brought her crop insurance customers with her to First Express.

### 1. ARLENE'S AGREEMENT WITH FIRST EXPRESS

Arlene and Gregory negotiated the terms of her business relationship with First Express, which they reduced to a written agreement. The agreement contained several notable provisions. In paragraph 7, Arlene agreed that “[a]ll renewals and goodwill arising out of the conduct of the insurance agency business shall be and remain the property of [First Express]; provided, however, that [Arlene] shall be entitled to retain the customers listed on Exhibit ‘A.’” It is undisputed, however, that there was no exhibit A attached to the agreement, though Arlene claimed that exhibit A existed. Throughout these proceedings, no one could produce a copy of exhibit A, although Arlene did attempt to recreate it.

In paragraph 8, Arlene acknowledged that she would be handling (and adding to) “confidential information of a special and unique nature and value relating to [First Express’] trade secrets, and customer lists, as well as the nature and type of products used and preferred by [First Express’] customers.” Arlene agreed that she would not, “at any time, during or following the term of this Agreement, directly or indirectly divulge or disclose any of the confidential information that [had] been obtained by [Arlene] as a result of the services provided.”

Finally, in paragraph 9, Arlene agreed to a covenant not to compete, among other things. But the parties, during trial, agreed to redact the covenant not to compete from the agreement, presumably because it was unenforceable and because First Express abandoned its claim based on the covenant. The pertinent remaining portions of paragraph 9 provided that during the term of the agreement and for 5 years after, Arlene would not “divulge, directly or indirectly, to any other insurance company, broker, or agency any information or lists or records with respect to business of [First Express], and [Arlene would], upon termination of this Agreement, properly return to [First Express] all records, lists and prospect cards.”

Paragraph 9 also prohibited Arlene from allowing “anyone to see or copy any of the cards or records, which [were] acquired, made or used while [Arlene] was retained by [First

Express], or in any other way do any act contrary to the interest of [First Express].” It acknowledged, however, that “the customer’s [sic] listed on Exhibit ‘A’ were customers of [Arlene] prior to [Arlene’s] retainer by [First Express]” and that, were the agreement terminated, Arlene would be “entitled to continue to write insurance for the customers listed on Exhibit ‘A’.” The jury based its finding that Arlene breached her contract on her taking and using the customer list in violation of the provisions in paragraphs 8 and 9 (excluding the covenant not to compete).

## 2. ARLENE RESIGNS AND TAKES CUSTOMER LIST

Arlene worked for both the bank and First Express for many years. But in separate letters dated November 30, 2009, she resigned from both positions effective December 31, “[d]ue to health reasons.” She personally delivered the bank resignation letter to the bank president, but the letter to First Express did not reach Gregory until sometime in January 2010.

When she resigned, Arlene took with her a First Express customer list. The list was an “Agency Commission Statement” from one of the companies for which First Express wrote crop insurance. This list apparently was available only by logging in using First Express identification and a password. The document listed all of First Express’ customers with that company and contained other significant information about each customer. The document included customers’ names and their 2009 information: what crops the farmers had, what counties the crops were located in, what insurance plan the farmers bought, what percentage of coverage each farmer had, and what commission First Express had earned. First Express considered this information both confidential and valuable.

## 3. ARLENE TRANSFERS CUSTOMERS TO MARK’S AGENCY AND FIRST EXPRESS SUES

Shortly after her resignation, Arlene started transferring First Express’ customers to her at Mark’s agency. In late January 2010, First Express began receiving transfer notices

from those customers. By March 15, the critical deadline in crop insurance, 90 percent of Arlene's customers had transferred to Mark's agency. Upon discovering this, First Express sued Arlene for breach of contract and sued Arlene, Mark, and Mark's agency for misappropriation of trade secrets and unjust enrichment. First Express based all of its claims on Arlene's alleged use of the customer list to transfer her customers.

#### 4. EVIDENCE AND TESTIMONY AT TRIAL

Evidence at trial showed that because the federal government sets all the rates, different insurance agencies cannot offer different rates on crop insurance. Farmers generally choose a crop insurance agency based on the agent. A farmer must have crop coverage by March 15, and if no transfer has occurred, the policy from the previous year automatically renews with the agency from the previous year. A farmer can transfer his or her crop insurance coverage from one agency to another by filling out and signing a transfer form. A transfer form has blanks for the customer's basic information such as name, address, Social Security number, and spouse. It also has blanks regarding the crop insurance the customer wants, including the county the crops are in, the type of crops, the insurance coverage level, and the type of insurance plan.

Testimony at trial indicated that the information on the customer list would have been helpful, though not necessary, to fill out the transfer form. Much of the information on the customer list was obtainable from other sources. Moreover, the transfer form did not need to be filled out completely to actually transfer the customer; rather, only the customer's signature and possibly a few other pieces of information were necessary. The rest of the information could be added or changed later, if done before March 15. And once the insurance carrier received a customer's transfer form, the customer's prior crop insurance information became available to the new agent on the carrier's Web site.

Arlene testified that when she submitted her resignations, she intended to continue selling crop insurance from her home. But then her son, Mark, a part owner of an insurance

agency, asked her to come work for him. On January 12, 2010, Arlene became an agent for Mark's agency. On or about January 15, Arlene sent a letter to former First Express customers, informing them of her resignation and soliciting their business.

Arlene testified further that she took the list only because she was concerned First Express would not pay her all the commissions due her after her resignation. She testified that with the list, she could prove what First Express owed her. She acknowledged that the information on the list could have been used in filling out transfer forms, but she claimed she used the list only for the names of her customers. She insisted that additional information was needed to transfer a customer and that all the information on the list could be obtained in other ways, including by simply talking to the farmer. Arlene apparently had excellent relationships with her customers; several testified that Arlene was an exceptional agent and that they would have followed her wherever she went.

Arlene did admit to making handwritten notes on the list, including notations that she sent solicitation letters to or called the customers. She also admitted that she filled out the transfer forms for many of her customers and then later obtained the customer's signature. Arlene testified that she never gave the information from the customer list to Mark.

Mark testified that although Arlene mentioned leaving First Express in 2008 and 2009, he did not specifically discuss her future plans with her until after she resigned from First Express. He had reviewed her contract with First Express in 2008 or 2009. He testified that although he knew she wanted to transfer her former First Express customers to his agency, he did not know she had taken the customer list. He was aware of the letters Arlene sent to her former customers and testified that Arlene brought significant new business into his agency. According to him, when his company makes more money, he makes more money as a shareholder. Mark also testified that all of the information on the customer list could be acquired either through Internet searches or by interviewing the farmers.

## 5. VERDICTS AND JUDGMENTS FOR FIRST EXPRESS

A jury found for First Express on the breach of contract claim and awarded \$506,035 against Arlene. It found for First Express on the Trade Secrets claim and awarded \$280,320 against Arlene, \$84,093 against Mark, and \$56,061 against Mark's agency. The jury also found for First Express on its unjust enrichment claim and awarded \$280,320 against Arlene, \$84,093 against Mark, and \$56,061 against Mark's agency.

The district court later entered judgment against Arlene for \$506,035, against Mark for \$84,093, and against Mark's agency for \$56,061. The court specifically noted that Arlene was individually liable for \$365,881 and jointly and severally liable with Mark for \$84,093 and with Mark's agency for \$56,061. Later, the court reduced the judgment against Arlene to \$500,275.72 based on a setoff agreed to by the parties. We granted Mark's petition to bypass the Nebraska Court of Appeals.

## III. ASSIGNMENTS OF ERROR

Arlene assigns, restated, that the district court erred in denying her motions for summary judgment, directed verdict, judgment notwithstanding the verdict, and new trial as to First Express' claims because (1) there was no meeting of the minds as to exhibit A, rendering the agreement unenforceable; (2) the noncompete, nonsolicitation, and confidentiality provisions were overly broad and unreasonable, rendering the agreement unenforceable; (3) the customer list was, as a matter of law, not a trade secret; and (4) First Express could not sue for both breach of contract and unjust enrichment. Arlene also assigns, restated, that the court erred in (1) failing to instruct the jury that it was First Express' burden to prove the terms of the written agreement by the greater weight of the evidence and (2) failing to properly instruct the jury on the recoverable damages for First Express' claims of misappropriation of trade secrets and unjust enrichment.

Mark assigns, restated and consolidated, that the court erred in (1) denying his motions for summary judgment,

directed verdict, and judgment notwithstanding the verdict as to First Express' unjust enrichment claim because there was no evidence that he engaged in wrongful conduct and the claim improperly sought profits protected by the corporate veil; (2) denying his motions for directed verdict and judgment notwithstanding the verdict as to First Express' misappropriation of trade secrets claim because the information on the customer list was not, as a matter of law, a trade secret, and because there was no evidence Mark engaged in wrongful conduct; (3) denying his motion for new trial because the court improperly instructed the jury on unjust enrichment and recoverable damages, there was no evidence to support piercing the corporate veil, and the award against him was excessive; and (4) denying Arlene's motions for summary judgment, directed verdict, judgment notwithstanding the verdict, and new trial because there was no evidence that she misappropriated First Express' trade secrets and because her actions did not proximately cause harm to First Express.

#### IV. STANDARD OF REVIEW

[1-3] Arlene's and Mark's assigned errors generally relate to the same issues at different stages of the proceedings, including denials of summary judgment, directed verdict, judgment notwithstanding the verdict, and new trial. The denial of a summary judgment motion generally becomes a moot issue on appeal after a final trial on the merits.<sup>1</sup> In reviewing rulings on motions for directed verdict and judgments notwithstanding the verdict, we give the nonmoving party the benefit of all evidence and reasonable inferences in his or her favor, and the question is whether a party is entitled to judgment as a matter of law.<sup>2</sup> Regarding motions for new trial, we will

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<sup>1</sup> See, e.g., *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012); *Wendeln v. Beatrice Manor*, 271 Neb. 373, 712 N.W.2d 226 (2006).

<sup>2</sup> See, e.g., *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013); *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

uphold a trial court's ruling on such a motion absent an abuse of discretion.<sup>3</sup>

## V. ANALYSIS

We pause to mention what is not at issue in this appeal. At no point in her brief did Arlene challenge whether her conduct proximately caused damage to First Express. Mark raised the issue in his brief in the context of First Express' claims against him, but, as will be seen below, we resolve his appeal on different grounds. Furthermore, to the extent Mark attempted to raise the issue for Arlene, he has no standing to do so because Mark and Arlene are separate parties with separate representation on appeal.

We will first address Arlene's arguments on appeal, followed by Mark's arguments. Because the jury returned multiple verdicts against Arlene and Mark, and because the district court imposed joint and several liability, we will address the validity of each individual verdict. Following that, we will address the specific judgments against Arlene and Mark.

### 1. ARLENE'S APPEAL

#### (a) Breach of Contract

Arlene argues that there was no valid, legally enforceable contract and that, therefore, she cannot be liable for breach of contract. Specifically, Arlene argues that the contract was unenforceable because (1) there was no "meeting of the minds" between the parties on exhibit A and (2) the contract's noncompete provisions were unenforceable. At oral argument, Arlene also argued that the contract was incomplete and therefore unenforceable, which, from her brief, we understand to be an extension of her "meeting of the minds" argument. But First Express argues that Arlene failed to preserve these arguments for our review. We agree.

[4] It is a longstanding rule that "[w]e will not consider an issue on appeal that was not presented to or passed upon

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<sup>3</sup> See, e.g., *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

by the trial court.”<sup>4</sup> At no time during the proceedings on her motions for summary judgment, directed verdict, judgment notwithstanding the verdict, or new trial, did Arlene argue to the court that the underlying contract was unenforceable. To the contrary, she proceeded on the theory that the contract was enforceable but contested only the elements of breach, causation, and damages.

And the record provides ample support for this conclusion. For example, the court instructed the jury that “[t]his case involve[d] a contract” between Arlene and First Express and that Arlene “admit[ted] the existence of the contract but denie[d] that she breached the contract, and further denie[d] that [First Express] suffered any damage as a result of any alleged breach.” Arlene did not object to these statements. Notably, too, Arlene herself counterclaimed for breach of contract (and that claim went to the jury), based on the same contract that she now argues was unenforceable. The record also reflects many instances where, had Arlene been challenging the enforceability of the contract, she would have made objections or arguments, but she did not.

Still, Arlene argues that she preserved her arguments for review. In her reply brief, Arlene argues that she “has consistently asserted in both her pleadings and sworn testimony that the alleged contract that First Express attempts to enforce is void and unenforceable.”<sup>5</sup> She points to specific portions of the pleadings, language in the court’s order on a motion for a temporary restraining order, and evidence indicating that the parties disagreed on the existence of exhibit A.

A review of those portions of the record, however, demonstrates that Arlene did not challenge the enforceability of the contract. The parties contested whether exhibit A existed and whether the parties had agreed to exhibit A. But Arlene did not argue that because there had been no “meeting of the

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<sup>4</sup> See, e.g., *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 962, 831 N.W.2d 696, 703 (2013). See, also, *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

<sup>5</sup> Reply brief for appellant Arlene at 1.

minds” on exhibit A, the contract was therefore unenforceable. And while Arlene challenged the enforceability of the covenant not to compete, she did not claim that the entire contract was unenforceable because of the covenant. We also note that to the extent Arlene’s challenge to the enforceability of the contract is based on other allegedly unenforceable provisions, the record shows that Arlene proposed the redaction to the contract and proceeded to trial with those provisions included. We do not review alleged errors which the assigning party invited.<sup>6</sup>

[5,6] Generally, an appellate court disposes of a case on the theory presented in the trial court.<sup>7</sup> Arlene defended the breach of contract claim at all material times on the theory that the contract was valid (contesting only the elements of breach, causation, and damages), and she cannot now assert for the first time on appeal that the contract was unenforceable.<sup>8</sup> When a party raises an issue for the first time on appeal, we will disregard it because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.<sup>9</sup> Because Arlene did not preserve her arguments for review on the breach of contract claim, we do not address them.

We note briefly that Arlene also argues that the court improperly instructed the jury on the breach of contract claim. Specifically, Arlene argues that the court did not instruct the jury that it was First Express’ burden to prove, by the greater weight of the evidence, the “‘terms of the contract.’”<sup>10</sup> From her brief, she premises this argument on her earlier argument regarding the lack of a meeting of the minds on exhibit A, an issue which Arlene cannot raise for the first time on appeal.

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<sup>6</sup> See, e.g., *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991).

<sup>7</sup> See, e.g., *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006).

<sup>8</sup> See *Tolbert*, *supra* note 4.

<sup>9</sup> See, *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011); *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002).

<sup>10</sup> Brief for appellant Arlene at 26.

Furthermore, Arlene did not object to the breach of contract instruction on that basis, which is an additional reason she has not preserved her argument for review.<sup>11</sup> Because Arlene did not preserve for review her arguments challenging the breach of contract verdict, we affirm the jury's finding against her on that claim.

(b) Misappropriation  
of Trade Secrets

Arlene argues that the customer list was not a trade secret because it was "nothing more than each crop insurance client's own insurance information, which was and is ascertainable by proper means and could never constitute a trade secret as a matter of law."<sup>12</sup> Not surprisingly, First Express argues that the information was proprietary and valuable and that it was a trade secret. We conclude, however, that because the customers' identities and contact information were ascertainable from public sources, and because the other information on the list was also ascertainable by proper means, the customer list was not a trade secret.

Nebraska's Trade Secrets Act<sup>13</sup> (the Act) defines a trade secret as

information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:

(a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>14</sup>

There is no dispute that the customer list was a "compilation," and Arlene does not argue that there were not reasonable

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<sup>11</sup> See, *State v. Valverde*, ante p. 280, 835 N.W.2d 732 (2013); *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011).

<sup>12</sup> Brief for appellant Arlene at 28.

<sup>13</sup> Neb. Rev. Stat. §§ 87-501 through 87-507 (Reissue 2008).

<sup>14</sup> § 87-502(4).

efforts to maintain its secrecy. Instead, Arlene contends that the customer list cannot be a trade secret as a matter of law because it does not derive economic value from “not being ascertainable by proper means by . . . other persons.”

Although the Act is based on the Uniform Trade Secrets Act,<sup>15</sup> the Act’s definition of a trade secret differs significantly from the uniform act. Under the uniform act, a trade secret is something that derives independent economic value “‘from not being [generally] known to, and not being [readily] ascertainable by proper means by, other persons . . . .’”<sup>16</sup> The Legislature, however, deleted the qualifiers “generally” and “readily” from the statutory definition.<sup>17</sup> And as one commentator noted, Nebraska’s statute greatly narrows the definition of a trade secret: “[U]nder the literal terms of the . . . language, if an alleged trade secret is *ascertainable at all* by any means that are not ‘improper,’ the would-be secret is peremptorily excluded from coverage under the [Act].”<sup>18</sup> The question, then, is whether the information on the list here was ascertainable by proper means.

We give statutory language its plain and ordinary meaning.<sup>19</sup> Applying the language here, the customer list does not qualify as a trade secret under § 87-502(4) because all of the information on the list was ascertainable by proper means. Mark testified, and no one disputed, that simple Internet searches could identify which farmers farmed what land and could provide contact information for those farmers. Arlene also demonstrated that she could recite most of her customers’ information from memory.<sup>20</sup> The rest of the information on the list essentially reflected the farmers’ previous insurance

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<sup>15</sup> See Gerald B. Buechler, Jr., *Revealing Nebraska’s Trade Secrets Act*, 23 Creighton L. Rev. 323 (1989-90).

<sup>16</sup> *Id.* at 328 n.28.

<sup>17</sup> See § 87-502(4)(a).

<sup>18</sup> Buechler, *supra* note 15 at 339 (emphasis in original).

<sup>19</sup> See, e.g., *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013).

<sup>20</sup> See *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010).

coverage on their crops. It is undisputed that the individual farmers had all of that information and that Arlene could have obtained the information from them through a simple telephone call.<sup>21</sup> Also, once a customer changed agencies, all of the customer's prior insurance information became available from the insurance carrier's Web site. Though the exact information required to transfer a customer is a bit unclear, the record shows that, at most, all that is required is the customer's name, address, type of crops, and signature, all of which are ascertainable by proper means.

[7] Concluding that this particular customer list is not a trade secret conforms with our decision in *Home Pride Foods v. Johnson*.<sup>22</sup> In that case, we noted that "[c]ourts are reluctant to protect customer lists to the extent that they embody information that is readily ascertainable through public sources."<sup>23</sup> We noted further that only "where time and effort have been expended to identify particular customers with particular needs or characteristics" will a list be protected.<sup>24</sup> And we noted that "[s]uch lists are distinguishable from mere identities and locations of customers that anyone could easily identify as possible customers."<sup>25</sup>

In holding that the customer list in *Home Pride Foods* was a trade secret, we affirmed the lower court's finding that the information on the list was not ascertainable through proper means. We noted that the record showed that "the customer list contained information not available from publicly available lists,"<sup>26</sup> such as which customers had previously placed food orders, along with the amount of those orders. We stated that "[w]ith such information, a competitor could undercut Home Pride [Food's] pricing."<sup>27</sup> And we emphasized that "if the

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<sup>21</sup> See *Harvest Life Ins. Co. v. Getche*, 701 N.E.2d 871 (Ind. App. 1998).

<sup>22</sup> *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001).

<sup>23</sup> *Id.* at 709, 634 N.W.2d at 782.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

information was readily available, why did the appellants pay \$800 for a stolen list?"<sup>28</sup>

Those same considerations are not present here. Critically, unlike the facts in *Home Pride Foods*, the identities and contact information for the customers were publicly available. Moreover, once the customer changed agencies (which required minimal information), all of the customer's prior insurance information became available via the insurance carrier's Web site. Furthermore, unlike in *Home Pride Foods*, the information on the list did not provide a competitive advantage to Arlene. The record shows that the federal government sets the prices on crop insurance and that she already knew (or could find out) the farmers who purchased crop insurance. And while the appellants in *Home Pride Foods* had no explanation for why they had paid for a stolen list (if the information on it were actually ascertainable through proper means), here Arlene explained she took the list to track her commissions. A witness for First Express testified to having used such lists in the past for the same reason. Because the information on the customer list was ascertainable through proper means, we conclude that, as a matter of law, it was not a trade secret. We reverse the jury's finding against Arlene on the misappropriation of trade secrets claim.

### (c) Unjust Enrichment

Arlene argues that the court erred in denying her motions for summary judgment, directed verdict, judgment notwithstanding the verdict, and new trial regarding First Express' unjust enrichment claim. Arlene argues that "Nebraska law does not allow a party to seek unjustment [sic] enrichment damages at the same time it seeks actual damages for breach of an express contract."<sup>29</sup> First Express argues that it was simply maintaining alternate theories of recovery, which is acceptable under Nebraska law.

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<sup>28</sup> *Id.*

<sup>29</sup> Brief for appellant Arlene at 33.

[8,9] Regardless whether the court properly allowed both claims to go to the jury, Arlene cannot be liable for both breach of contract and unjust enrichment for the same conduct.<sup>30</sup> Counsel for First Express conceded this at oral argument. Furthermore, there is no question regarding the priority of a claim for breach of contract and a claim for unjust enrichment flowing from the same conduct; liability under a contract displaces liability under an unjust enrichment theory.<sup>31</sup> Considering that the jury found her liable for breach of contract, it is as if the unjust enrichment verdict did not exist. That being the case, we need not address this assigned error because it is not necessary to the disposition of this appeal.<sup>32</sup>

Similarly, we need not address Arlene's argument that the court erred in instructing the jury regarding damages for the misappropriation of trade secrets claim and the unjust enrichment claim. Arlene cannot be liable for misappropriation of a trade secret (the customer list was not a trade secret) or unjust enrichment (she is already liable for breach of contract).

#### (d) Summation

We affirm the jury's finding against Arlene on the breach of contract claim. Arlene failed to preserve for review her arguments challenging the enforceability of the underlying contract. We reverse the jury's finding against her on the misappropriation of trade secrets claim. The customer list was not a trade secret under § 87-502(4). And because the jury found against Arlene on the breach of contract claim, and because liability under a contract displaces liability under an unjust enrichment theory, Arlene is not liable for unjust enrichment.

### 2. MARK'S APPEAL

Mark takes issue with the jury's verdicts against him for misappropriation of trade secrets and unjust enrichment. As discussed earlier, the customer list was not a trade secret,

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<sup>30</sup> See *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996).

<sup>31</sup> See *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

<sup>32</sup> See, e.g., *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

so we reverse the jury's verdict against Mark on the misappropriation of trade secrets claim. Regarding the jury's verdict against Mark for unjust enrichment, Mark makes several arguments as to why we must also reverse that verdict. These include, restated, that the record failed to show that he engaged in wrongful or unjust conduct, that his conduct proximately caused damage to First Express, or that piercing the corporate veil was appropriate. Alternatively, Mark also argues that the court should have granted a new trial for several of the same reasons and, in addition, because of alleged errors in the jury instructions.

We address only Mark's corporate veil argument because it is dispositive. Mark argues that the only benefit he received from the alleged use of the customer list "was from his ownership share of [the agency], a corporation."<sup>33</sup> And Mark argues that as an owner of the corporation, his corporate profits cannot be the subject of a lawsuit without piercing the corporate veil. First Express disagrees and argues that, regardless, Mark personally benefited because "he personally gained additional ownership in the company and in accomplishing a payoff to" another shareholder.<sup>34</sup>

Mark cites to cases in other jurisdictions for the proposition that "[u]njust enrichment cannot be used to recover benefits obtained as an owner of a corporation unless the pleadings and evidence warrant piercing the corporate veil."<sup>35</sup> Our research reveals other cases which support that position.<sup>36</sup>

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<sup>33</sup> Brief for appellant Mark at 33.

<sup>34</sup> Brief for appellee First Express in response to brief of appellant Mark at 19.

<sup>35</sup> Brief for appellant Mark at 33 (citing *U.S. ex rel. Purcell v. MWI Corp.*, 520 F. Supp. 2d 158 (D.D.C. 2007)); *Howard v. Turnbull*, 316 S.W.3d 431 (Mo. App. 2010); and *Levin v. Kitsis*, 82 A.D.3d 1051, 920 N.Y.S.2d 131 (2011)).

<sup>36</sup> See, *Bigio v. Coca-Cola Co.*, 675 F.3d 163 (2d Cir. 2012), *cert. denied* \_\_\_ U.S. \_\_\_, 133 S. Ct. 952, 184 L. Ed. 2d 752 (2013); *United States v. Dean Van Lines, Inc.*, 531 F.2d 289 (5th Cir. 1976); *Usov v. Lazar*, No. 13 Civ. 818 (RWS), 2013 U.S. Dist. LEXIS 89257 (S.D.N.Y. June 25, 2013); *Metalmecanica Del Tiberina v. Kelleher*, No. 04-2467, 2005 U.S. App. LEXIS 23946 (4th Cir. Nov. 4, 2005) (unpublished opinion).

First Express has not provided us with any cases to the contrary, and we have not found any. Instead, courts seem to allow unjust enrichment claims against a shareholder for benefits obtained from the corporation only where piercing the corporate veil is appropriate.<sup>37</sup> Neither First Express' pleadings nor the evidence in this case support piercing the corporate veil.<sup>38</sup>

First Express argues, however, that Mark obtained a personal benefit (outside of his corporate profits) because he gained additional ownership interest in the company due to the use of the customer list. A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.<sup>39</sup> But even viewed through this highly deferential lens, the record does not support First Express' assertion. Mark testified that he previously had an agreement to purchase up to a 20-percent ownership of the business. He specifically noted that the agreement required him to make set payments which could not be accelerated based on increased profits. He further testified that he "capped out" his ownership interest, in that he obtained the maximum 20-percent ownership, in late December 2009 or early 2010.

The record fails to show that Mark made any gains in his personal capacity or that he was unjustly enriched in his personal capacity. Any unjust benefit went to the corporation, not to Mark individually. The fact that Mark personally earned more money if his business earned more money is not sufficient to impose personal liability on Mark for unjust enrichment.<sup>40</sup>

So First Express' claim of unjust enrichment against Mark fails as a matter of law; he did not receive a personal benefit,

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<sup>37</sup> See, e.g., *Sea-Land Services, Inc. v. Pepper Source*, 993 F.2d 1309 (7th Cir. 1993).

<sup>38</sup> See *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995).

<sup>39</sup> *Wulf*, *supra* note 2; *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

<sup>40</sup> See cases cited *supra* notes 35-36.

in that he acted in his corporate capacity and received benefits only because of his status as a shareholder. And because there is no allegation or apparent reason to pierce the corporate veil, he is protected. No claim for unjust enrichment will lie against Mark. Thus, there is no need to address Mark's other assigned errors regarding the unjust enrichment claim. From the above analysis, we reverse both verdicts against Mark.

### 3. MODIFYING AND REVERSING JUDGMENTS

Recall that the jury found for First Express on the breach of contract claim against Arlene and awarded \$506,035. It found for First Express on the trade secrets claim and awarded \$280,320 against Arlene, \$84,093 against Mark, and \$56,061 against Mark's agency. And it also found for First Express on the unjust enrichment claim and awarded \$280,320 against Arlene, \$84,093 against Mark, and \$56,061 against Mark's agency. The court entered judgment against Arlene for \$506,035, against Mark for \$84,093, and against Mark's agency for \$56,061. But the court specifically noted that Arlene was individually liable for \$365,881 and jointly and severally liable with Mark for \$84,093 and with Mark's agency for \$56,061. The court later reduced the judgment against Arlene to \$500,275.72 based on a setoff agreed to by the parties.

By setting Arlene's individual liability at \$365,881 and joint and several liability at \$140,154, the court essentially apportioned Arlene's liability between the various claims—\$365,881 for breach of contract and the remaining \$140,154 for misappropriation of trade secrets and unjust enrichment. This is because neither Mark nor Mark's agency had a contract with First Express, so joint and several liability could only have been based on the claims of misappropriation of trade secrets and unjust enrichment. Because we conclude that Arlene is not liable for either misappropriation of trade secrets or unjust enrichment, we vacate the latter portion of the judgment (\$140,154). We therefore modify the judgment against Arlene so that she is liable for \$360,121.72 (after applying the setoff of \$5,759.28). And, as stated earlier, we reverse the judgment against Mark in total.

## VI. CONCLUSION

We conclude that Arlene is liable for breach of contract but not for misappropriation of trade secrets or unjust enrichment. We modify the judgment against Arlene accordingly. We also conclude that Mark is not liable for misappropriation of trade secrets or unjust enrichment. We reverse the judgment against Mark.

AFFIRMED IN PART AS MODIFIED,  
AND IN PART REVERSED.

STEPHAN, MILLER-LEMAN, and CASSEL, JJ., not participating.

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STATE OF NEBRASKA, APPELLEE, V.  
ANTWAN L. JONES, APPELLANT.

840 N.W.2d 57

Filed November 22, 2013. No. S-12-1208.

1. **Identification Procedures: Due Process: Appeal and Error.** A trial court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.
2. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
3. **Motions to Suppress: Courts: Records.** District courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress. The degree of specificity required will vary from case to case.
4. **Constitutional Law: Identification Procedures: Due Process.** An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
5. **Trial: Identification Procedures: Police Officers and Sheriffs: Evidence.** In determining the admissibility of an out-of-court identification, the trial court must first decide whether the police used an unnecessarily suggestive identification procedure. If they did, the court must next consider whether that procedure so tainted the resulting identification as to render it unreliable and thus inadmissible.
6. **Criminal Law: Identification Procedures: Witnesses: Words and Phrases.** A showup is usually defined as a one-on-one confrontation where the witness views only the suspect, and it is commonly conducted at the scene of the crime, shortly after the arrest or detention of a suspect and while the incident is still fresh in the witness' mind.

7. **Identification Procedures.** Reliability is the linchpin in determining the admissibility of identification testimony.
8. \_\_\_\_\_. Factors to be considered in determining the reliability of a witness' identification include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. Against these factors is to be weighed the corrupting influence of the suggestive identification itself.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

Karen A. Newirth and Barry C. Scheck for amicus curiae The Innocence Project.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

## I. INTRODUCTION

Following a jury trial, the district court convicted Antwan L. Jones of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Jones appeals, arguing the district court erred in overruling Jones' motions to suppress eyewitness identifications. Jones also argues the district court failed to articulate its findings in overruling the motions to suppress. We affirm.

## II. BACKGROUND

Dejuan Johnson was shot and killed on the afternoon of September 24, 2011. That afternoon, Dejuan and his cousin, Herbert Johnson, were walking along Ames Avenue in Omaha, Nebraska, when Herbert observed a black male wearing a black Carhartt jacket, a baseball cap, and jeans exit from a vehicle and walk behind them. Herbert glanced back at the man three

times. The third time Herbert looked back, the man asked, "What's up now . . . ," aimed a gun at Dejuan, and fired.

Herbert was a few feet from the shooter when the shooter spoke. Herbert estimated that he observed the shooter's face for 20 to 30 seconds. Herbert noticed the shooter had gold teeth and a scar on his face. Police quickly arrived at the scene. The shooter fled on foot.

Herbert gave police a description of the shooter, stating he was a black male approximately 5 feet 11 inches to 6 feet 1 inch, 160 to 170 pounds, wearing a black "fitted hat," a black Carhartt jacket, a black undershirt, and blue or black jeans. A few minutes after giving his initial description, Herbert also told officers the shooter had gold upper teeth. Approximately 15 to 20 minutes later, officers told Herbert they believed they had found the shooter but were not sure and asked if Herbert would identify him. Officers brought Jones, in handcuffs, to the scene. Herbert told officers Jones was similar in height and weight, but was not wearing the same clothes as the shooter. Herbert asked an officer to have Jones smile, and seeing Jones' gold teeth, Herbert made a positive identification.

At the motion to suppress hearing and again at trial, Herbert identified Jones as the shooter. Herbert testified he was "a hundred percent sure" of his identification based on a scar on Jones' face and his gold teeth.

Officer Robert Myers of the Omaha Police Department was on duty on the afternoon of September 24, 2011, patrolling in the area of 55th Street and Ames Avenue, when he observed two people on the northwest corner—one lying on the ground, and another standing over him. The standing party looked at Myers for approximately 2 seconds before fleeing, and Myers observed him to be a black male wearing dark clothing, approximately 5 feet 10 inches to 6 feet tall. Myers also observed that the party held a silver automatic handgun. Myers then noticed a third party across the street who also appeared to be running from the intersection. The third party, later identified as Herbert, soon returned to the scene. Myers ordered Herbert to stay where he was and radioed for assistance, stating that he had heard shots fired, that a party was down, that a black male in black clothing was seen running northeast, and

that he was holding another party at gunpoint. When backup arrived, Myers ran to the party on the ground, later identified as Dejuan. Myers performed CPR until paramedics arrived and then rode in an ambulance with Dejuan to a hospital. Myers was called back to the scene roughly an hour later to identify a possible suspect.

Upon returning to the area, Myers parked his police cruiser approximately 1½ blocks from the scene and began to walk toward the intersection of 55th Street and Ames Avenue. While walking, he observed another cruiser with a party seated in the back seat. Myers approached, opened the door to the cruiser, and spoke to the party seated in the back seat. The party identified himself as Jones. As they spoke, Myers recognized Jones as the party with the gun who had fled from the scene earlier. Myers then located the command officer on the scene and told her that the party in the cruiser was the same party he had previously seen running from the scene. Myers testified that he was “[a] hundred percent” certain he recognized Jones as the party with the gun.

Myers identified Jones in court at the motion to suppress hearing. Myers stated he had “no doubt” Jones was the party Myers saw with a gun on the corner of 55th Street and Ames Avenue. Myers also identified Jones at trial.

A dark T-shirt and pair of jeans were found in a nearby apartment. A black cap with an “M” on it was found nearby, and a black Carhartt jacket was found in a Dumpster near the apartment building. In the sleeve of the jacket, officers found a silver handgun. Ballistics testing later revealed that this gun matched shell casings found at the scene, and testing showed Jones to be the likely source of DNA found on the jeans. Surveillance video from a nearby store showed Jones wearing the dark jeans, T-shirt, and cap approximately an hour prior to the shooting.

A jury found Jones guilty of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Jones was sentenced to life imprisonment for first degree murder, 40 to 50 years’ imprisonment to be served consecutively for use of a deadly weapon to commit a felony, and 40 to 50 years’ imprisonment to be

served concurrently for possession of a deadly weapon by a prohibited person.

### III. ASSIGNMENTS OF ERROR

Jones assigns the following errors of the district court, restated and reordered: (1) The court erred when it failed to articulate its findings in overruling Jones' motions to suppress the eyewitness identifications of Herbert and Myers, and (2) the court erred in overruling the motions to suppress and in subsequently allowing both witnesses to make in-court identifications of Jones.

### IV. STANDARD OF REVIEW

[1] A trial court's conclusion whether an identification is consistent with due process is reviewed *de novo*, but the court's findings of historical fact are reviewed for clear error.<sup>1</sup>

[2] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.<sup>2</sup>

### V. ANALYSIS

#### 1. ARTICULATION OF FINDINGS

In his first assignment of error, Jones argues that the court's rulings regarding Jones' motions to suppress lacked specific factual findings and that thus, this court is precluded from any meaningful review.

[3] This court has held that "‘district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress.’"<sup>3</sup> We have further noted that the degree of specificity required will vary case to case.<sup>4</sup>

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<sup>1</sup> *State v. Dixon*, *ante* p. 334, 837 N.W.2d 496 (2013).

<sup>2</sup> *State v. Bromm*, 285 Neb. 193, 826 N.W.2d 270 (2013); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

<sup>3</sup> *State v. Graham*, 259 Neb. 966, 971, 614 N.W.2d 266, 270 (2000) (quoting *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996)).

<sup>4</sup> *Id.*

The district court's orders in this case tell us little beyond that the court found the police procedures were not unduly suggestive and that the identifications were reliable. It would have been helpful if the court's articulation of factual findings had been more detailed; however, the facts were not in dispute in the motions to suppress. Jones offered no witnesses or other evidence at the motion to suppress hearings. As such, we can infer that the court found the State's witnesses credible and we are able to proceed to consideration of the merits of the motions to suppress based on the record before us. Accordingly, we find Jones' first assignment of error to be without merit.

## 2. EYEWITNESS IDENTIFICATIONS

In his second assignment of error, Jones argues that the district court erred in overruling his motions to suppress the eyewitness identifications of Herbert and Myers, because police procedures used in obtaining these identifications were unduly suggestive, in violation of the Due Process Clauses of the U.S. and Nebraska Constitutions. Additionally, we note the concerns set forth in the amicus brief submitted by The Innocence Project. But those arguments were not urged at the time of trial, and as such, we decline to apply them on appeal.

[4,5] An identification procedure is constitutionally invalid only when it is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.<sup>5</sup> The U.S. Supreme Court provides a two-part test for determining the admissibility of an out-of-court identification: "[T]he trial court must [first] decide whether the police used an unnecessarily suggestive identification procedure. . . . If they did, the court must next consider whether [that] procedure so tainted the resulting identification as to render it unreliable and thus inadmissible."<sup>6</sup>

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<sup>5</sup> *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005); *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004).

<sup>6</sup> *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 722, 181 L. Ed. 2d 694 (2012).

(a) Eyewitness Identification  
by Herbert

[6] A showup is usually defined as a one-on-one confrontation where the witness views only the suspect. A showup is commonly conducted at the scene of the crime, shortly after the arrest or detention of a suspect, while the incident is still fresh in the witness' mind.<sup>7</sup> The State concedes Herbert's identification of Jones constituted a showup. However, admission of evidence of a showup does not, by itself, violate due process.<sup>8</sup>

[7,8] "Reliability is the linchpin in determining the admissibility of identification testimony."<sup>9</sup> We have stated:

The factors to be considered [in determining the reliability of a witness' identification] include (1) the opportunity of the witness to view the alleged criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his or her prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation. . . . Against these factors is to be weighed the corrupting influence of the suggestive identification itself.<sup>10</sup>

We consider these factors in turn.

(i) *Opportunity to View Shooter*

The shooting occurred outdoors in broad daylight. Herbert testified that he glanced at the shooter three times over a short span of time prior to the shooting. Herbert also observed the shooter's face for 20 to 30 seconds from a distance of roughly 3 feet when the shooter spoke to Dejuan and fired his gun. Herbert had time to observe the suspect, and his observation was free from any obstructions. This factor weighs in favor of reliability.

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<sup>7</sup> *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (1990).

<sup>8</sup> *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

<sup>9</sup> *State v. Faust*, *supra* note 5, 269 Neb. at 757, 696 N.W.2d at 427.

<sup>10</sup> *Id.* (citations omitted).

*(ii) Degree of Attention*

Herbert's testimony indicated that he glanced at the shooter repeatedly prior to the shooting because he was "on the alert" while in that area of the city. Once Herbert was confronted, his attention was focused on the shooter until the police arrived. One might assume there was some degree of panic at the sight of the gun, and Herbert testified that both he and Dejuan attempted to run away when the shooter began firing. However, Herbert had viewed the shooter more than once by looking back while walking before the shooter actually spoke and pulled out the gun. This factor also weighs in favor of admissibility.

*(iii) Prior Description*

Herbert provided police with a relatively detailed description of the shooter, including race, approximate age, height, weight, and clothing. Prior to being shown the suspect, Jones, Herbert also told officers that the shooter had gold upper teeth. Although Jones was wearing different clothing when located, Herbert noted such, and clothing matching the description provided by Herbert was located in the area.

Jones does not argue that the description provided by Herbert was inaccurate, but notes that Herbert failed to include Jones' facial scar in his description to police. While a description including the scar would also have weighed strongly in favor of reliability, the description of the shooter's gold teeth provided a distinguishing feature which bolstered the reliability of Herbert's identification. The description provided was sufficiently detailed and accurate to weigh in favor of reliability.

*(iv) Level of Certainty*

It was undisputed that Herbert was not positive whether Jones was the shooter until he saw his gold teeth. However, even prior to inquiring whether Jones had gold teeth, Herbert told officers that Jones looked similar, and noted Jones was not wearing the dark jacket, shirt, and jeans he had been wearing during the shooting.

Herbert testified that he was "a hundred percent sure" of his identification, but one officer on the scene testified that

at the time of the identification, Herbert stated he was “fairly confident” Jones was the shooter. The officer was uncertain of the precise language used by Herbert, but testified that Herbert seemed confident. This was not a case where the eyewitness expressed notable doubt. Taking the circumstances as a whole, we find that this factor weighs in favor of reliability.

*(v) Time Before Confrontation*

There is some uncertainty in the record regarding timing, but considering all of the testimony, it seems Herbert’s identification of Jones took place 15 minutes to 1 hour after the shooting. The identification took place at the scene of the crime while it was still fresh in the witness’ mind. This factor weighs strongly in favor of reliability.

*(vi) Conclusion*

Herbert had an unobstructed view of the shooter from a close distance. He provided police with a detailed description of the shooter, and his identification of Jones took place shortly after the shooting occurred. Even assuming that the identification was procured under unnecessarily suggestive circumstances arranged by law enforcement, considering the totality of the circumstances, the identification was reliable and its admission was not a violation of due process.

(b) Eyewitness Identification  
by Myers

As the State notes, although Myers was called back to the scene for the purpose of identifying a suspect, his identification was essentially unprompted. “When no improper law enforcement activity is involved . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose . . . .”<sup>11</sup>

While Myers was not actually asked to identify Jones, there may have been some degree of suggestiveness created by Jones’ being handcuffed and in the back of a police cruiser at the scene of the crime. As such, we consider the reliability factors in turn.

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<sup>11</sup> *Perry v. New Hampshire*, *supra* note 6, 565 U.S. at 233.

*(i) Opportunity to View Suspect*

Although the observation took place in daylight, free from obstruction, Myers had only a moment to view the suspect's face. This first factor likely weighs against reliability.

*(ii) Degree of Attention*

Myers was not a casual observer, but a trained police officer on duty who knew that his recollection of the suspect's face would likely be critical to the suspect's arrest.<sup>12</sup> This factor weighs in favor of reliability.

*(iii) Prior Description*

The description provided by Myers over his radio was general, but there is no indication that anything Myers stated was inaccurate. Furthermore, the record does not indicate Myers had the opportunity to provide a detailed description to anyone before he observed Jones in the police cruiser and identified him as the party with the gun. This factor weighs in favor of reliability.

*(iv) Level of Certainty*

Myers expressed that he had "no doubt" Jones was the party he saw with the gun. His certainty weighs in favor of reliability.

*(v) Time Before Confrontation*

Although the record is not entirely clear as to the timing, the testimony as a whole indicates Myers' identification of Jones took place somewhere between ½ to 1½ hours after he observed the suspect run from the scene of the shooting. This factor weighs heavily in favor of reliability.

*(vi) Conclusion*

Myers had an unobstructed view of the suspect. He was a trained police officer on duty when he viewed the suspect. Upon returning to the scene, Myers recognized Jones after speaking with him, without prompting from other officers. Considering the totality of the circumstances, Myers'

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<sup>12</sup> See *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

identification was reliable and its admission was not a violation of due process.

(c) Conclusion Regarding  
Eyewitness Identifications

In considering the reliability factors set forth above, the eyewitness identifications of both Herbert and Myers were reliable. Moreover, the descriptions separately provided by Herbert and Myers were not inconsistent with each other, nor were they inconsistent with the other evidence produced at trial. As such, both identifications were admissible. Jones' second assignment of error is without merit.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE  
OF THE NEBRASKA SUPREME COURT, RELATOR, V.

DONNA J. TONDERUM, RESPONDENT.

840 N.W.2d 487

Filed November 22, 2013. No. S-13-083.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. \_\_\_\_\_. Under Neb. Ct. R. § 3-304, the Nebraska Supreme Court may impose one or more of the following disciplines: (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; or (4) censure and reprimand.
3. \_\_\_\_\_. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. \_\_\_\_\_. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and the Nebraska Supreme Court considers the attorney's acts underlying the events of the case and throughout the proceedings.

5. \_\_\_\_\_. In determining the appropriate discipline of an attorney, the Nebraska Supreme Court considers the discipline imposed in cases presenting similar circumstances.
6. \_\_\_\_\_. The Nebraska Supreme Court considers an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as an important matter and as a threat to the credibility of attorney disciplinary proceedings.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

PER CURIAM.

### INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court, relator, filed formal charges against Donna J. Tonderum for disclosing confidential information regarding criminal charges against a former client in order to ensure the client's conviction. Tonderum failed to respond to the formal charges. Upon relator's motion for judgment on the pleadings, we entered judgment limited to the facts but reserved ruling on the appropriate discipline. We now conclude that an indefinite suspension from the practice of law is the proper sanction.

### BACKGROUND

Tonderum was admitted to the practice of law in Nebraska on September 19, 2003. She engaged in the private practice of law in Elkhorn, Nebraska.

On February 5, 2013, relator filed formal charges against Tonderum. Although Tonderum was served with the formal charges, she did not respond to them. On April 3, relator moved for a judgment on the pleadings. On May 8, we granted judgment on the pleadings as to the facts alleged in the formal charges, but we directed the parties to brief the issue of discipline. Only relator filed a brief.

The record in this case is composed of the uncontested formal charges. On August 13, 2012, the State charged Tonderum's client with first degree sexual assault in the county court for Platte County, Nebraska. On that same date, Tonderum appeared in court with her client and entered her appearance on his behalf. A preliminary hearing was set for September 10. At all relevant times, the chief deputy county attorney for Platte County prosecuted the case against Tonderum's client.

On or before August 21, 2012, Tonderum's client and his family hired another attorney to take over his representation. Tonderum was informed that her representation of the client was terminated. On August 21, the other attorney entered his appearance on behalf of the client and a copy of his entry of appearance was mailed to Tonderum.

On September 7, 2012, Tonderum called the prosecutor to discuss the pending case. Tonderum stated that she no longer represented her former client because he had rejected her advice and hired the other attorney. Tonderum stated that she "hated" the other attorney, that she knew her former client was guilty, and that she wanted to make sure the prosecutor sent Tonderum's former client to prison. Tonderum gave the prosecutor the names of several witnesses related to the former client's case, stated what their testimonies would be, provided contact information for certain witnesses, and stated what she expected the defense strategy to be.

On September 10, 2012, the prosecutor notified relator regarding her September 7 telephone conversation with Tonderum. The prosecutor also informed the defendant's new attorney of the conversation with Tonderum and of the need for the prosecutor's office to withdraw from prosecuting the case. Upon the prosecutor's motion, the district court appointed a special prosecutor.

A grievance was filed against Tonderum based upon the information provided by the prosecutor. The grievance was mailed to Tonderum by relator on September 11, 2012. On September 17, Tonderum mailed her response. In her response, Tonderum asserted that the allegations were false. She admitted speaking to the prosecutor by telephone on September 7, but denied that she had made the statements attributed to her.

Tonderum admitted that she no longer represented the client on September 7 and that she discussed his case with the prosecutor, including identifying several witnesses and what their testimonies would be.

The formal charges were then filed. Relator alleged that Tonderum's acts violated Neb. Rev. Stat. § 7-104 (Reissue 2012), Tonderum's oath of office as an attorney licensed to practice law in the State of Nebraska, and the Nebraska rules governing professional conduct. Specifically, relator alleged that Tonderum violated Neb. Ct. R. of Prof. Cond. §§ 3-501.6(a) (confidentiality of information); 3-508.1(a) (bar admission and disciplinary matters); and 3-508.4(a), (c), and (d) (misconduct). As we have already noted, Tonderum failed to respond to the formal charges, resulting in a judgment on the pleadings as to the facts.

### ANALYSIS

[1] A proceeding to discipline an attorney is a trial de novo on the record.<sup>1</sup> Because we granted judgment on the pleadings as to the facts, the only issue before us is the appropriate discipline.<sup>2</sup>

[2,3] Under Neb. Ct. R. § 3-304, we may impose one or more of the following disciplines: (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as we may designate; or (4) censure and reprimand.<sup>3</sup> To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.<sup>4</sup>

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<sup>1</sup> *State ex rel. Counsel for Dis. v. Cording*, 285 Neb. 146, 825 N.W.2d 792 (2013).

<sup>2</sup> See *id.*

<sup>3</sup> *State ex rel. Counsel for Dis. v. Palik*, 284 Neb. 353, 820 N.W.2d 862 (2012).

<sup>4</sup> *Id.*

[4] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and this court considers the attorney's acts underlying the events of the case and throughout the proceedings.<sup>5</sup> Tonderum has been licensed to practice law since September 2003, and this is the first disciplinary proceeding initiated against her. In other words, she had an unblemished disciplinary record for the 9-year period from her admission until the instant violation. But her breach of client confidentiality is an extremely serious offense. Moreover, it caused the prosecutor's office to withdraw from the case and necessitated the appointment of a special prosecutor. And when confronted with the initial grievance, Tonderum responded by essentially accusing the prosecutor of lying. Tonderum has since failed to respond to the formal charges and, thus, has not provided us with any evidence of other mitigating circumstances.

[5] In determining the appropriate discipline of an attorney, we consider the discipline imposed in cases presenting similar circumstances.<sup>6</sup> As relator correctly observes, there are no published Nebraska decisions in which an attorney has been sanctioned for violating § 3-501.6.

Although we also look to cases involving the predecessor to that rule, Canon 4, DR 4-101, of the Code of Professional Responsibility, they provide only limited guidance. In *State ex rel. Counsel for Dis. v. Beach*,<sup>7</sup> an attorney disclosed confidential information about a client after disciplinary charges were filed against him. This court determined that disbarment was appropriate, but the attorney in that case had exhibited a pattern of abusive conduct and had two prior reprimands before the two cases at issue. In *State ex rel. Counsel for Dis. v. Lopez Wilson*,<sup>8</sup> an attorney threatened to reveal client confidences

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<sup>5</sup> *State ex rel. Counsel for Dis. v. Cording*, *supra* note 1.

<sup>6</sup> See *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012).

<sup>7</sup> *State ex rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006).

<sup>8</sup> *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001).

upon learning of the client's intimate relationship with the attorney's ex-wife. We determined that the attorney should be suspended from the practice of law for 2 years. As we stated in that case:

Respondent's conduct has a chilling effect on the public's perception of attorneys and the [Nebraska State Bar Association] in general. The maintenance of the reputation of the [Nebraska State Bar Association] as a whole depends in part on the client's ability to be able to fully confide in his or her attorney. If clients do not believe they can do this, then attorneys will no longer be able to fully and zealously represent their clients.<sup>9</sup>

Similarly, Tonderum's conduct in using information obtained from a former client against that client reflects negatively on the public's perception of attorneys and could deter clients from being completely honest with their attorneys.

Relator directs us to a somewhat similar case from another jurisdiction. In *The Florida Bar v. Knowles*,<sup>10</sup> an attorney who had been practicing law for approximately 4 years at the time of the misconduct informed an assistant state attorney that she believed her client would lie in court and sent confidential client paperwork to that attorney. The Florida Supreme Court stated: "A lawyer who is upset with her client is not permitted to turn on her client and begin disparaging and betraying her. Rather, the lawyer must maintain client confidences, even after withdrawing from representation."<sup>11</sup> The court determined that a 1-year suspension was appropriate. However, we believe that a 1-year suspension is not adequate under the circumstances of the instant case.

We have found no case law from other jurisdictions imposing disbarment without the attorney's having profited from the disclosure of client confidences<sup>12</sup> or without multiple

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<sup>9</sup> *Id.* at 661, 634 N.W.2d at 474.

<sup>10</sup> *The Florida Bar v. Knowles*, 99 So. 3d 918 (Fla. 2012).

<sup>11</sup> *Id.* at 924.

<sup>12</sup> See *In re Smith*, 991 N.E.2d 106 (Ind. 2013).

other instances of misconduct.<sup>13</sup> Although we have not often looked to the ABA Standards for Imposing Lawyer Sanctions<sup>14</sup> for guidance<sup>15</sup> and they are not in any sense controlling, we observe that the ABA standards suggest different consequences for an attorney's failure to preserve the client's confidences depending upon the circumstances of the disclosure and the resulting effect upon the client. Generally, the ABA standards suggest suspension for an intentional disclosure that injures a client but does not benefit the lawyer or another.<sup>16</sup> On the other hand, the ABA standards recommend disbarment where the intentional disclosure injures a client and is done with the intent to benefit the lawyer or another.<sup>17</sup> This distinction would suggest suspension of Tonderum rather than disbarment, as she apparently sought no benefit for herself or another.

[6] Tonderum's failure to respond to the formal charges filed by relator is also troublesome. We consider an attorney's failure to respond to inquiries and requests for information from relator as an important matter and as a threat to the credibility of attorney disciplinary proceedings.<sup>18</sup> As noted, Tonderum's failure to file an answer to the formal charges leaves us without any record of mitigating factors, other than her previous record of no violations, and no way to assess her fitness to practice law.

In *State ex rel. Counsel for Dis. v. Sutton*,<sup>19</sup> an attorney failed to respond to the formal charges, leaving this court

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<sup>13</sup> See, e.g., *People v. Bannister*, 814 P.2d 801 (Colo. 1991); *In re Ingersoll*, 186 Ill. 2d 163, 710 N.E.2d 390, 237 Ill. Dec. 760 (1999); *Matter of Ghobashy*, 185 A.D.2d 23, 592 N.Y.S.2d 322 (1993).

<sup>14</sup> ABA Standards for Imposing Lawyer Sanctions (rev. 1992).

<sup>15</sup> See, e.g., *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

<sup>16</sup> ABA Standards, *supra* note 14, § 4.22.

<sup>17</sup> *Id.*, § 4.21.

<sup>18</sup> See *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

<sup>19</sup> *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005).

with a lack of information regarding the nature and extent of the misconduct and the attorney's present or future fitness to practice law. We declined to disbar the attorney and instead imposed an indefinite suspension. Similarly, under the facts of this case, we conclude that an indefinite suspension, with a minimum suspension of 3 years, is the appropriate discipline.

### CONCLUSION

We find and hereby order that Tonderum should be indefinitely suspended from the practice of law in the State of Nebraska effective upon the filing of this opinion, with a minimum suspension of 3 years. Any application for reinstatement filed by Tonderum after the minimum suspension period shall include a showing under oath which demonstrates her fitness to practice law and fully addresses the circumstances of the instant violation.

Tonderum is directed to comply with Neb. Ct. R. § 3-316, and upon failure to do so, she shall be subject to punishment for contempt of this court. Tonderum is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

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IN RE INTEREST OF VIOLET T., A CHILD  
UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLANT, V.  
ABIGAE T., APPELLEE.

840 N.W.2d 459

Filed November 22, 2013. No. S-13-084.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.

3. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action or proceeding before the court and the particular question which it assumes to determine.
4. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
5. **Juvenile Courts.** The Nebraska Juvenile Code should be liberally construed.
6. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, the juvenile court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 2008).
7. **Jurisdiction: Minors: Domicile: Child Custody.** The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents.

Appeal from the Separate Juvenile Court of Douglas County:  
DOUGLAS F. JOHNSON, Judge. Appeal dismissed.

Donald W. Kleine, Douglas County Attorney, Debra Tighe-Dolan, and Emily H. Anderson, Senior Certified Law Student, for appellant.

Kate E. Placzek, of Law Office of Kate E. Placzek, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

### INTRODUCTION

The Douglas County Attorney (the State) filed an amended petition alleging Violet T. was a minor child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the faults and habits of her biological mother, Abigail T. The State also filed a motion for temporary custody. Abigail moved to dismiss. Finding it lacked subject matter jurisdiction, the separate juvenile court of Douglas County dismissed the petition. We dismiss this appeal.

### BACKGROUND

Violet was born in a hospital located in Douglas County, Nebraska, in November 2012. According to the petition filed

by the State, Violet tested positive for methamphetamine at birth. Abigael admitted to using methamphetamine during pregnancy and stated she was not prepared to care for an infant. Violet was discharged from the hospital a few days after her birth and was taken to live with relatives in Iowa. It is not apparent from the record who took Violet from the hospital to her relatives in Iowa.

On November 16, 2012, the State filed a petition alleging Violet was a minor child living or to be found in Douglas County who came within the meaning of § 43-247(3)(a) due to the faults and habits of Abigael. The petition alleged that Violet was in the custody of the Nebraska Department of Health and Human Services (DHHS). The State also filed a motion for a protective custody hearing.

On November 21, 2012, a hearing was held in juvenile court. At that hearing, DHHS clarified that Violet was not in its custody. Counsel for Violet's mother moved to dismiss, arguing that although Violet was born in Nebraska and Abigael had requested voluntary services from DHHS, Violet had never actually lived in Nebraska. The State objected to the motion. The objection was sustained, and the case was set for a hearing on the motion to dismiss.

On December 3, 2012, the State filed an amended petition alleging that Violet was a minor child "born, domiciled, living or to be found in Douglas County, Nebraska," who came within the meaning of § 43-247(3)(a) due to the faults and habits of her biological mother, Abigael. The petition stated that Abigael's address was unknown and that Violet was currently residing in Council Bluffs, Iowa. The State also filed a motion for temporary custody, along with an affidavit from the social worker who had investigated the case while Violet was still in the hospital. The same day, the juvenile court issued an order granting DHHS immediate custody of Violet.

On December 10, 2012, a hearing was held in the juvenile court. Abigael renewed her motion to dismiss based on lack of subject matter jurisdiction and improper venue. DHHS joined the motion, agreeing that there was no jurisdiction because Violet was "not found in Douglas County [and] had already been voluntarily placed by [Abigael] with relatives in Iowa."

The State and the guardian ad litem objected to the motion. The juvenile court heard arguments and received evidence. The parties stipulated that Violet was born in Douglas County but that upon discharge from the hospital, she went to live in Iowa and remained there at the time of filing the petition and at the time of the hearing.

On January 2, 2013, the juvenile court issued an order dismissing the amended petition for lack of subject matter jurisdiction. The State appeals.

### ASSIGNMENT OF ERROR

On appeal, the State assigns that the juvenile court erred in refusing to establish subject matter jurisdiction over the minor child, Violet.

### STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.<sup>1</sup>

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.<sup>2</sup>

### ANALYSIS

[3] The State's sole argument on appeal is that the juvenile court erred in finding that it lacked subject matter jurisdiction. Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action or proceeding before the court and the particular question which it assumes to determine.<sup>3</sup>

Abigail asserted, and the juvenile court found, that the court lacked authority to hear and determine whether Violet was a juvenile within the meaning of § 43-247(3)(a).

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<sup>1</sup> See *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011).

<sup>2</sup> See *id.*

<sup>3</sup> *Id.*

[4,5] As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.<sup>4</sup> The Nebraska Juvenile Code should, however, be liberally construed.<sup>5</sup>

[6] Section 43-247(3) states that the juvenile court in each county shall have jurisdiction over “[a]ny juvenile . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian.” We have held that “to obtain jurisdiction over a juvenile, the court’s only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.”<sup>6</sup> Section 43-247 mentions neither the residence of a parent nor the residence of a child.

[7] The State argues that Violet’s absence from Nebraska was temporary and, further, that the domicile of a child is determined by the residence of the child’s custodian. But we have stated:

The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. As we said in *In re Application of Reed* [152 Neb. 819, 43 N.W.2d 161 (1950)]: “The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as *parens patriae* to every child *within its borders* to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction.”<sup>7</sup>

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<sup>4</sup> *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

<sup>5</sup> See *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010).

<sup>6</sup> *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 1004-05, 767 N.W.2d 74, 91 (2009).

<sup>7</sup> *Jones v. State*, 175 Neb. 711, 717, 123 N.W.2d 633, 637 (1963) (emphasis supplied).

In the case at hand, Violet was born in Nebraska, but was no longer within this state's borders at the time the petition was filed. Although the State suggests Violet was in Iowa temporarily, the facts of this case as established by the record indicate that apart from the days just following her birth, Violet has never lived anywhere else but in Iowa. As is established by this record, there is no Nebraska home to which Violet might return.

Additionally, we note that Neb. Rev. Stat. § 43-274(1) (Reissue 2008) authorizes a county attorney "having knowledge of a juvenile in his or her county" who appears to be within § 43-247 to file a petition in "the court having jurisdiction in the matter." In this case, however, Violet was not in Douglas County, even temporarily, at the time the petition was filed. We conclude the *parens patriae* power of the State does not provide a basis for finding jurisdiction in this case.

We also find no jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>8</sup> The UCCJEA provides that a court has jurisdiction to make a custody determination if:

(1) [T]his state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) a court of another state does not have jurisdiction under subdivision (a)(1) of this section, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 43-1244 or 43-1245, and:

(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

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<sup>8</sup> Neb. Rev. Stat. § 43-1226 et seq. (Reissue 2008 & Cum. Supp. 2012).

(B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(3) all courts having jurisdiction under subdivision (a)(1) or (a)(2) of this section have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under 43-1244 or 43-1245; or

(4) no court of any other state would have jurisdiction under the criteria specified in subdivision (a)(1), (a)(2), or (a)(3) of this section.<sup>9</sup>

"Home state" is defined as the state in which a child has lived with a parent or person acting as parent for at least 6 consecutive months, or from birth, before the commencement of the proceeding.<sup>10</sup> Because, apart from a few days just following her birth, Violet has never lived in Nebraska, and Nebraska is not Violet's home state under the UCCJEA. This is true despite the fact that Violet was born in Nebraska.<sup>11</sup> Therefore, in the case at hand, none of the provisions of the UCCJEA provide a statutory basis for jurisdiction.

Finally, the State cites to *In re Interest of Breana M.*<sup>12</sup> But contrary to the arguments of the State, that case provides us with no basis for jurisdiction in this matter. *In re Interest of Breana M.* involves the exercise of jurisdiction across Nebraska counties but is wholly inapplicable here, where the issue involves the jurisdiction of a child located in a state other than Nebraska.

## CONCLUSION

We agree the juvenile court lacked subject matter jurisdiction in this case. For the foregoing reasons, we dismiss the State's appeal.

APPEAL DISMISSED.

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<sup>9</sup> § 43-1238.

<sup>10</sup> § 43-1227(7).

<sup>11</sup> See *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008).

<sup>12</sup> *In re Interest of Breana M.*, 18 Neb. App. 910, 795 N.W.2d 660 (2011).

STATE OF NEBRASKA, APPELLEE, V.  
MATTHEW A. FOX, APPELLANT.  
840 N.W.2d 479

Filed November 22, 2013. No. S-13-408.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When lawyers employed by the same office represent a defendant both at trial and on direct appeal, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
5. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
6. **Postconviction: Pleadings.** A defendant is required to make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief.
7. **Postconviction.** Postconviction relief without an evidentiary hearing is properly denied when the files and records affirmatively show that the prisoner is entitled to no relief.
8. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
9. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually

prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise.

10. \_\_\_\_: \_\_\_\_\_. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Matthew A. Fox, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

## INTRODUCTION

Matthew A. Fox appeals the denial of his motion for post-conviction relief without an evidentiary hearing. He asserted three claims of ineffective assistance of counsel, two at the trial stage and one at the appellate stage. Because (1) the jury instructions, taken as a whole, correctly stated the elements of the crime, (2) Fox failed to identify an expert who would have opined differently on Fox's sanity, and (3) the arguments omitted by appellate counsel lacked any merit, Fox failed to make any factual allegations which, if proved, constitute an infringement of his rights under the Nebraska or federal Constitution.

## BACKGROUND

The facts as adduced at Fox's trial are contained in *State v. Fox*<sup>1</sup> and are not repeated herein, except as otherwise indicated. A jury convicted Fox of first degree murder and use of a weapon to commit a felony for the killing of Fox's mother. Fox was sentenced to life imprisonment on the murder conviction and to a consecutive sentence of 10 to 15 years' imprisonment on the weapon conviction. We affirmed Fox's

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<sup>1</sup> *State v. Fox*, 282 Neb. 957, 806 N.W.2d 883 (2011).

convictions on direct appeal.<sup>2</sup> At trial and on direct appeal, Fox was represented by lawyers from the Nebraska Commission on Public Advocacy.

Fox's motion for postconviction relief asserted three claims of ineffective assistance of counsel. He alleged that (1) his trial counsel failed to object to erroneous jury instructions, (2) his trial counsel failed to obtain an additional expert opinion as to Fox's sanity at the time of the killing, and (3) his appellate counsel failed to raise the issues of insufficient evidence and erroneous jury instructions on appeal.

With respect to the jury instructions given at trial, Fox claimed that instructions Nos. 7 and 9 reduced the State's burden of proof in establishing first degree murder by relieving it of the requirement to prove deliberation and premeditation. Fox alleged that instructions Nos. 7 and 9 improperly permitted the jury to infer the existence of deliberation and premeditation.

Instruction No. 7 provided, in pertinent part, as follows:

As used in these instructions:

. . . .

2. "Intentionally" means willfully or purposely.

3. "Purposely" means not suddenly or rashly but doing an act after first considering the probable consequences.

4. "Premeditated" means forming the intent to act before acting. The time needed for premeditation may be so short as to be instantaneous provided the intent to act is formed before the act and not simultaneous with the act.

5. "Malice" means intentionally doing a wrongful act without just cause or excuse.

As relevant to this appeal, instruction No. 9 provided:

Intention and deliberation and premeditation and purpose are elements of Murder in the First Degree. . . . You may infer intention and deliberation and premeditation and purpose from the words and acts of . . . Fox and from the surrounding circumstances, so long as such inference proves beyond a reasonable doubt that . . . Fox

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<sup>2</sup> See *id.*

had such intention and deliberation and premeditation and purpose.

Fox alleged that by first equating “[i]ntentionally” to “willfully or purposely” and then defining “[p]urposely” with a definition akin to “deliberate[ly],” the instructions permitted the jury to infer that the killing was deliberate if the jury found that it was intentional. Fox similarly alleged that instruction No. 9 improperly permitted the jury to infer the existence of deliberation and premeditation. Thus, according to Fox, he was prejudiced by his trial counsel’s failure to object to instructions Nos. 7 and 9 because they reduced the State’s burden of proof.

Fox’s second claim asserted that his trial counsel failed to obtain an additional expert opinion as to Fox’s sanity at the time of the killing. In his motion, Fox alleged that his trial counsel obtained a psychological examination finding that there was insufficient information to reach a conclusion as to Fox’s sanity at the time of the killing. Fox asserted that reasonable counsel would have sought an additional examination with conclusive results. Thus, Fox alleged, his trial counsel’s failure to obtain a conclusive expert opinion effectively conceded the issue of Fox’s sanity.

As to Fox’s appellate counsel, Fox alleged that he was prejudiced by his counsel’s failure to raise the issues of insufficient evidence and erroneous jury instructions on appeal. Fox claimed that the State failed to present any evidence at trial that the killing was deliberate or premeditated. Further, Fox asserted that jury instructions Nos. 7 and 9 improperly reduced the State’s burden of proof in establishing first degree murder. Fox alleged that his appellate counsel therefore caused him prejudice by failing to raise these issues on appeal.

As we noted at the outset of this opinion, the district court denied Fox’s motion without an evidentiary hearing. We summarize the court’s reasoning regarding each of Fox’s claims.

The court first rejected Fox’s argument that he was prejudiced by his trial counsel’s failure to object to jury instructions Nos. 7 and 9. The court reasoned that the instructions as a whole properly instructed the jury to find each element of first

degree murder. Thus, because the jury instructions as a whole correctly instructed the jury, the court concluded that Fox could not show he was prejudiced by his counsel's failure to object to instructions Nos. 7 and 9.

The court also rejected Fox's argument that he was prejudiced by his trial counsel's failure to obtain an additional expert opinion as to Fox's sanity at the time of the killing. The court noted that Fox failed to make any showing that an additional expert would have reached a different conclusion than the experts that testified at trial. The court further observed that even if an expert had testified to Fox's insanity at the time of the killing, Fox failed to demonstrate that such testimony would have caused the jury to reach a different conclusion on the issue. The court therefore found that Fox failed to show any prejudice from his trial counsel's failure to obtain an additional expert opinion.

The court similarly rejected Fox's claim that he was prejudiced by ineffective assistance of counsel on appeal. With respect to the failure of Fox's appellate counsel to raise the issue of erroneous jury instructions, the court found that Fox could not show he was prejudiced on appeal because he made no showing that he was prejudiced by the instructions at trial. As to the failure of Fox's appellate counsel to raise the issue of insufficient evidence, the court found that sufficient evidence was introduced at trial from which the jury could properly have found all of the elements of first degree murder. Thus, Fox failed to show that the result would have been different had the issue been raised on appeal.

Because Fox failed to establish prejudice arising from his claims of ineffective assistance of counsel, the district court concluded that Fox failed to make any factual allegations demonstrating a denial or infringement of his due process rights. Accordingly, the court denied Fox's motion.

Fox filed a timely notice of appeal.

#### ASSIGNMENTS OF ERROR

Fox assigns that the district court erred in denying his motion for postconviction relief without an evidentiary hearing. Fox further assigns that the court erred in finding that he

failed to show any prejudice arising from his claims of ineffective assistance of counsel.

## STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.<sup>3</sup> With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,<sup>4</sup> an appellate court reviews such legal determinations independently of the lower court's decision.<sup>5</sup>

## ANALYSIS

### FIRST OPPORTUNITY

[3] At the outset, we note that this is Fox's first opportunity to assert that he received ineffective assistance of counsel in the disposition of his case. When lawyers employed by the same office represent a defendant both at trial and on direct appeal, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.<sup>6</sup> Because Fox was represented both at trial and on direct appeal by lawyers from the same office, he could not raise these issues on direct appeal.

### REQUIRED SHOWINGS

[4] We have previously set forth the requirements to establish a right to postconviction relief based on a claim of ineffective assistance of counsel. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*,<sup>7</sup> to show that

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<sup>3</sup> *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

<sup>4</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

<sup>5</sup> *McGhee*, *supra* note 3.

<sup>6</sup> *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

<sup>7</sup> *Strickland*, *supra* note 4.

counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.<sup>8</sup> Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.<sup>9</sup> In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.<sup>10</sup> The two prongs of this test, deficient performance and prejudice, may be addressed in either order.<sup>11</sup>

[5-7] We have also set forth the circumstances under which an evidentiary hearing on a motion for postconviction relief must be granted. We have stated that an evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.<sup>12</sup> But, this court has required that a defendant make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief.<sup>13</sup> And postconviction relief without an evidentiary hearing is properly denied when the files and records affirmatively show that the prisoner is entitled to no relief.<sup>14</sup>

The district court concluded that Fox failed to make any factual allegations demonstrating a denial or infringement of his constitutional rights. We independently review the sufficiency of these allegations in accordance with our case law applying the *Strickland* analysis. Although the district court based its conclusions upon the prejudice prong of *Strickland*, we may address the prongs in either order.

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<sup>8</sup> *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

#### JURY INSTRUCTIONS

[8] Turning first to Fox's argument addressing the jury instructions, we recall both the rule governing prejudicial error in jury instructions and the statutory elements of the crime of first degree murder. We have previously stated that all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.<sup>15</sup> The elements of first degree murder are set forth in Neb. Rev. Stat. § 28-303 (Reissue 2008), which provides that a person commits first degree murder when he or she kills another person "purposely and with deliberate and premeditated malice."

The jury instructions, taken as a whole, imposed upon the State the burden to prove all of the elements of first degree murder. Jury instruction No. 4 set forth the elements of first degree murder as a killing done "purposely and with deliberate and premeditated malice." Thus, the instructions precisely followed the language of § 28-303. Further, instruction No. 4 informed the jury that it must decide "whether the State proved each element set forth above beyond a reasonable doubt." Jury instruction No. 9 did not conflict with instruction No. 4. Instruction No. 9 charged the jury that intention, deliberation, premeditation, and purpose are elements of first degree murder. Thus, contrary to Fox's argument, the instructions did not reduce the State's burden of proof. Rather, the jury instructions as a whole correctly charged the jury regarding all of the elements of first degree murder. Because the instructions as a whole properly instructed the jury, Fox's trial counsel did not perform deficiently in failing to object to instructions Nos. 7 and 9.

#### ADDITIONAL EXPERT

Fox's second claim of ineffective assistance of counsel is based upon the failure of his trial counsel to obtain an additional expert opinion as to Fox's sanity at the time of the

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<sup>15</sup> See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

killing. This allegation lacks sufficient specificity to satisfy the prejudice prong of the *Strickland* test.

In *State v. McGhee*,<sup>16</sup> we affirmed the dismissal of the defendant's request for postconviction relief without an evidentiary hearing, based upon the defendant's failure to identify an expert who would have testified at trial that the defendant was incompetent to stand trial or legally insane at the time of the killing. We also reasoned that even if another expert had testified, it did not follow that the competency and sanity determinations would necessarily or even probably have been different.<sup>17</sup> We therefore resolved the defendant's claim using the prejudice prong of *Strickland*.<sup>18</sup>

In the instant case, Fox's motion similarly failed to identify an additional expert who would have testified that Fox was insane at the time of the killing. His motion also failed to set forth the testimony that the additional expert would have given. Fox's motion alleged only that his counsel's failure to pursue an additional expert opinion caused him prejudice. Thus, Fox failed to allege facts which, if proved, would establish a reasonable probability that the outcome of his case would have been different if his trial counsel had retained an additional psychiatric expert. The district court correctly concluded that Fox failed to show any prejudice from this claim.

#### CLAIMS AGAINST APPELLATE COUNSEL

[9] Finally, Fox asserts that his appellate counsel failed to assign and argue the allegedly erroneous jury instructions and the sufficiency of the evidence. When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant.<sup>19</sup> That is, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise.<sup>20</sup>

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<sup>16</sup> *McGhee*, *supra* note 3.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

<sup>20</sup> *Id.*

[10] But Fox raises the same argument regarding the jury instructions that we have already rejected. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.<sup>21</sup> As discussed above, the jury instructions as a whole correctly instructed the jury to find all of the elements of first degree murder. Appellate counsel would not have changed the result by making the argument. Thus, the failure of Fox's appellate counsel to raise the jury instructions on appeal was not deficient performance.

As to the failure of Fox's appellate counsel to raise an issue regarding the sufficiency of the evidence, we agree with the district court's conclusion that sufficient evidence was presented to the jury from which it could have properly found all of the elements of first degree murder. Succinctly stated, the State presented evidence that Fox and his mother had a dysfunctional relationship, that Fox struck his mother multiple times with an ax in an assault that occurred in the basement of their home, and that Fox later told police officers that he thought he had killed his mother. We therefore find that no reasonable probability exists that raising the issue of insufficient evidence would have changed the result on appeal. Thus, Fox's appellate counsel did not perform deficiently in failing to raise this issue.

### CONCLUSION

We affirm the district court's denial of Fox's motion for postconviction relief without an evidentiary hearing based upon our finding that Fox failed to make any factual allegations which, if proved, constitute an infringement of his rights under the Nebraska or federal Constitution.

AFFIRMED.

McCORMACK, J., participating on briefs.

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<sup>21</sup> *Id.*

STATE OF NEBRASKA, APPELLEE, V.  
ROBERT C. TAYLOR, APPELLANT.  
840 N.W.2d 526

Filed December 6, 2013. No. S-12-241.

1. **Prior Convictions: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court, viewing and construing the evidence most favorably to the State, will not set aside a finding of a previous conviction for the purposes of sentence enhancement supported by relevant evidence.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Sentences: Prior Convictions: Proof.** In order to prove a prior conviction for purposes of sentence enhancement, the State has the burden to prove the fact of prior convictions by a preponderance of the evidence, and the trial court determines the fact of prior convictions based upon the preponderance of the evidence standard.
4. **Trial: Evidence: Proof.** Preponderance of the evidence requires proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
7. **Drunk Driving: Prior Convictions: Proof: Time.** The plain and ordinary meaning of Neb. Rev. Stat. § 60-6,197.02 (Reissue 2010) does not require the State to prove the exact date of the prior offense.
8. \_\_\_\_: \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Under Neb. Rev. Stat. § 60-6,197.02 (Reissue 2010), the State has the burden to prove by a preponderance of the evidence that the prior offense occurred in the 12 years prior to the current offense.
9. **Rules of the Supreme Court: Appeal and Error.** Absent plain error, the Supreme Court's review on a petition for further review is restricted to matters assigned and argued in the briefs.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and RIEDMANN, Judges, on appeal thereto from the District Court for Lancaster County, ROBERT R. OTTE, Judge. Judgment of Court of Appeals affirmed.

Robb N. Gage for appellant.

Jon Bruning, Attorney General, Erin E. Tangeman, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

McCORMACK, J.

### NATURE OF CASE

This case is before this court on further review of the decision of the Nebraska Court of Appeals.<sup>1</sup> Robert C. Taylor pled guilty in the district court for Lancaster County to driving under the influence (DUI). The Court of Appeals affirmed the conviction and found that at the enhancement hearing, the State had met its evidentiary burden in establishing Taylor's prior DUI convictions. We granted Taylor's petition for further review.

### BACKGROUND

On May 20, 2011, Taylor was arrested for driving under the influence of alcohol. On August 26, 2011, the State filed an information charging Taylor with DUI. The State alleged that it was his fourth offense, which would enhance the conviction to a Class IIIA felony. The State alleged Taylor had been convicted of three prior DUI's in Lancaster County and that the offenses had occurred on March 17, 2002; November 25, 2001; and June 14, 1999.

On January 19, 2012, Taylor pled guilty to DUI. The State provided a factual basis for the offense, and the district court accepted Taylor's plea. The district court then immediately proceeded to an enhancement hearing.

At the enhancement hearing, the State presented five exhibits. For Taylor's 1999 and 2001 DUI convictions, the State offered the certified court records. The exhibits were entered without objection. The State testified that the Lancaster County Court could not locate the certified court record for Taylor's 2002 DUI conviction.

In lieu of the certified court record for the 2002 conviction, the State offered exhibits 1, 2, and 5. Exhibit 1 is a certified copy of the electronic records of case No. CR02-4882 from

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<sup>1</sup> *State v. Taylor*, No. A-12-241, 2013 WL 1111621 (Neb. App. Mar. 19, 2013) (selected for posting to court Web site).

JUSTICE, an online court records retrieval system in Nebraska. Exhibit 1 contains the citation number, the date the case was filed, the plea date, and the sentencing date. Exhibit 2 is a certified copy of the bill of exceptions from that case. It includes the arraignment, the plea hearing, and the sentencing hearing. During the plea hearing for the 2002 conviction, the parties stipulated that there was a factual basis to accept Taylor's guilty plea. Exhibit 5 is a certified copy of Taylor's driving record from the Nebraska Department of Motor Vehicles. It shows the same citation date as exhibit 1, the same case number as exhibits 1 and 2, and the same judgment date as exhibit 2. Exhibit 5 lists the citation date as March 17, 2002. None of the three exhibits state the date of the offense.

Exhibit 2 was received by the district court without objection. Counsel for Taylor objected to exhibit 1 based on relevance and to exhibit 5 based upon foundation, relevance, hearsay, and hearsay within hearsay. The district court overruled these objections and received the evidence.

Using the three exhibits, the district court found that the State had met its burden of proof for the prior 2002 conviction. The court found that Taylor had three prior convictions and that the current DUI offense should be enhanced to a fourth offense. Following a hearing, the district court sentenced Taylor to 90 days' imprisonment, 3 years' probation, a \$1,000 fine, and a license revocation of 15 years.

On appeal, the Court of Appeals affirmed and held that although there was no offense date in the record, it was clear from the exhibits the DUI offense occurred in 2002.<sup>2</sup> We granted further review.

#### ASSIGNMENTS OF ERROR

In his petition for further review, Taylor assigns that the Court of Appeals erred in finding that the court-certified copy of electronic JUSTICE records received as exhibit 1, a certified copy of the bill of exceptions received as exhibit 2, and a certified copy of Taylor's driving record were sufficient to establish Taylor's prior DUI conviction in case No. CR02-4882.

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<sup>2</sup> *Id.*

### STANDARD OF REVIEW

[1] On a claim of insufficiency of the evidence, an appellate court, viewing and construing the evidence most favorably to the State, will not set aside a finding of a previous conviction for the purposes of sentence enhancement supported by relevant evidence.<sup>3</sup>

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.<sup>4</sup>

### ANALYSIS

The question before us is whether the State must prove an exact offense date for a prior conviction to meet its burden in establishing Taylor's 2002 DUI conviction for purposes of enhancement. Taylor argues that because the State failed to prove an offense date, it cannot meet its burden to prove by a preponderance of the evidence that the violation in CRO2-4882 was committed within the 12 years previous to the conviction for fourth-offense DUI.

[3,4] In order to prove a prior conviction for purposes of sentence enhancement, the State has the burden to prove the fact of prior convictions by a preponderance of the evidence, and the trial court determines the fact of prior convictions based upon the preponderance of the evidence standard.<sup>5</sup> Preponderance of the evidence requires proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.<sup>6</sup>

Neb. Rev. Stat. § 60-6,197.03 (Reissue 2010) sets out the penalties for DUI convictions. The penalties include increased sentences for repeat DUI offenses. Neb. Rev. Stat. § 60-6,197.02 (Reissue 2010), which is the statute at issue in this case, explains how to determine prior DUI offenses for purposes of

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<sup>3</sup> *State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995).

<sup>4</sup> *State v. Abdulkadair*, ante p. 417, 837 N.W.2d 510 (2013).

<sup>5</sup> *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009).

<sup>6</sup> See *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), *abrogated on other grounds*, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

sentence enhancement. At the time of Taylor's arrest in 2011, § 60-6,197.02 stated:

(1) A violation of section 60-6,196 or 60-6,197 shall be punished as provided in section 60-6,197.03. For purposes of sentencing under section 60-6,197.03:

(a) Prior conviction means a conviction for a violation committed within the twelve-year period prior to the offense for which the sentence is being imposed as follows:

....

(c) Twelve-year period means the period computed from *the date of the prior offense* to the date of the offense which resulted in the conviction for which the sentence is being imposed.

(2) In any case charging a violation of section 60-6,196 or 60-6,197, the prosecutor or investigating agency shall use due diligence to obtain the person's driving record from the Department of Motor Vehicles and the person's driving record from other states where he or she is known to have resided within the last twelve years. The prosecutor shall certify to the court, prior to sentencing, that such action has been taken. The prosecutor shall present as evidence for purposes of sentence enhancement a court-certified copy or an authenticated copy of a prior conviction in another state. The court-certified or authenticated copy shall be prima facie evidence of such prior conviction.

(3) For each conviction for a violation of section 60-6,196 or 60-6,197, the court shall, as part of the judgment of conviction, make a finding on the record as to the number of the convicted person's prior convictions. The convicted person shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.

(Emphasis supplied.)

[5,6] Statutory language is to be given its plain and ordinary meaning, and this court will not resort to interpretation

to ascertain the meaning of statutory words which are plain, direct, and unambiguous.<sup>7</sup> It is not within the province of this court to read a meaning into a statute that is not warranted by the legislative language.<sup>8</sup>

[7,8] We find that the plain and ordinary meaning of § 60-6,197.02 does not require the State to prove the exact date of the prior offense. It states that “[p]rior conviction means a conviction for a violation committed within the twelve-year period prior to the offense for which the sentence is being imposed . . . .”<sup>9</sup> The 12 years is calculated “from *the date of the prior offense* to the date of the offense which resulted in the conviction for which the sentence is being imposed.”<sup>10</sup> Although having proof of the exact offense date would be the easiest method of proof, the statute does not require an exact date. Rather, the State must prove by a preponderance of the evidence that the prior offense occurred in the 12 years prior to the current offense.

Once the State meets its burden, § 60-6,197.02 shifts the burden to the defendant.<sup>11</sup> The defendant then has the opportunity “to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.”<sup>12</sup> This burden-shifting paradigm was created to simplify the prosecution’s ability to make a prima facie case for purposes of enhancement against repeat offenders.<sup>13</sup>

[9] Before we address the evidence presented, Taylor argued in his brief and at oral argument that the district court erred in receiving exhibits 1 and 5 over Taylor’s objections. However, we note that these objections were not assigned

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<sup>7</sup> *Amen v. Astrue*, 284 Neb. 691, 822 N.W.2d 419 (2012).

<sup>8</sup> *Id.*

<sup>9</sup> § 60-6,197.02(1)(a).

<sup>10</sup> § 60-6,197.02(1)(c) (emphasis supplied).

<sup>11</sup> See *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

<sup>12</sup> § 60-6,197.02(3). See *State v. Garcia*, *supra* note 11.

<sup>13</sup> *State v. Garcia*, *supra* note 11.

in his petition for further review. The only issue assigned by Taylor on further review is whether the State sufficiently met its burden. It is well established that a petition for further review and supporting memorandum brief must specifically set forth and discuss any error assigned to the Court of Appeals.<sup>14</sup> Absent plain error, our review on a petition for further review is restricted to matters assigned and argued in the briefs.<sup>15</sup> Thus, we will not address Taylor's objections to exhibits 1 and 5.

On an appeal of a sentence enhancement hearing, we view and construe the evidence most favorably to the State.<sup>16</sup> The record establishes Taylor committed the current offense on May 20, 2011. Therefore, any prior DUI conviction is relevant for enhancing Taylor's sentence if the DUI offense occurred on or after May 20, 1999.

Here, the preponderance of the relevant evidence establishes that the offense at issue had to have occurred on or after September 1, 2001. At the plea hearing for the 2002 conviction, the district court repeatedly referenced that Taylor had been charged with DUI with a blood alcohol concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of breath. This is crucial because in 2001, the Legislature had lowered the level from .10 of 1 gram to .08 of 1 gram.<sup>17</sup> Prior to September 1, 2001, a person was not guilty of DUI unless his or her blood alcohol content was .10 of 1 gram or more. Because Taylor was charged with DUI for having a blood alcohol concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of breath, we find that the preponderance of the evidence establishes that Taylor's DUI offense occurred on or after September 1, 2001.

After the district court found that the State had carried its burden concerning the 2002 DUI conviction, the district court

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<sup>14</sup> *State v. Dreimanis*, 258 Neb. 239, 603 N.W.2d 17 (1999).

<sup>15</sup> *Id.*

<sup>16</sup> *State v. Linn*, *supra* note 3.

<sup>17</sup> Compare Neb. Rev. Stat. § 60-6,196(1)(c) (Cum. Supp. 2000), with § 60-6,196(1)(c) (Cum. Supp. 2002).

properly shifted the burden back to Taylor.<sup>18</sup> The district court gave Taylor an opportunity to present evidence at the enhancement hearing. Taylor failed to do so. As we noted in *State v. Garcia*,<sup>19</sup> the defendant in enhancement proceedings is in a unique position to produce evidence concerning prior convictions, because it is within his knowledge. Taylor has firsthand knowledge of approximately when the offense occurred. And yet, Taylor never argued that the offense date for his 2002 DUI conviction occurred before May 20, 1999. Taylor failed to rebut the State's prima facie case for enhancement.

Therefore, we affirm the Court of Appeals' decision that the district court correctly found that the relevant evidence makes it more likely than not that the 2002 DUI conviction's offense date was within 12 years of the 2011 DUI offense.

### CONCLUSION

For purposes of enhancement of a DUI offense, the State is not required under § 60-6,197.02 to provide an exact offense date for prior convictions. Rather, the State is required to prove by the preponderance of the evidence that the prior offense occurred within the 12 years prior to the offense for which the defendant is being charged. In this case, the evidence establishes that Taylor's 2002 DUI conviction more likely than not occurred within the 12 years prior to his May 20, 2011, DUI offense. For this reason, we affirm the Court of Appeals' decision.

AFFIRMED.

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<sup>18</sup> See *State v. Garcia*, *supra* note 11.

<sup>19</sup> *Id.*

STATE OF NEBRASKA, APPELLEE, V.  
TYRESE A. PHILLIPS, APPELLANT.  
840 N.W.2d 500

Filed December 6, 2013. No. S-12-711.

1. **Constitutional Law: Self-Incrimination: Appeal and Error.** A court's decision to allow a witness to invoke his or her Fifth Amendment right against self-incrimination is reviewed for an abuse of discretion.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
3. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
5. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to hearsay rulings under the residual hearsay exception.
6. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
7. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
8. **Motions for Mistrial: Appeal and Error.** Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not be disturb its ruling unless the court abused its discretion.
9. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
10. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
11. **Constitutional Law: Self-Incrimination.** The provision in the Fifth Amendment to the U.S. Constitution that no person shall be compelled to give evidence against himself or herself of an incriminating nature must be accorded liberal construction in favor of the right it was intended to secure.
12. \_\_\_\_: \_\_\_\_\_. The Fifth Amendment privilege not only permits a person to refuse to testify against himself or herself during a criminal trial in which he or she is a defendant, but also grants him or her the privilege to refuse to answer

questions put to him or her in any other proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him or her in future criminal proceedings.

13. **Constitutional Law: Witnesses: Self-Incrimination.** While a witness may invoke the Fifth Amendment to avoid answering questions, the witness' assertion of the privilege does not by itself establish the risk of incrimination; instead, the court must make inquiry to determine itself whether answering the questions would raise Fifth Amendment concerns.
14. \_\_\_\_: \_\_\_\_: \_\_\_\_\_. The privilege against compulsory self-incrimination afforded by the Fifth Amendment not only extends to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant. It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.
15. **Immunity: Witnesses: Prosecuting Attorneys.** Absent a motion by the county attorney or other prosecuting attorney, a trial court lacks authority to grant immunity and order a witness to testify.
16. **Confessions: Rules of Evidence: Words and Phrases.** A "statement" within the meaning of Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008) is a specific individual statement that a proponent offers into evidence rather than the entire narrative of which the statement is a part; § 27-804(2)(c) uses the term "statement" in a narrow sense to refer to a specific declaration or remark incriminating the speaker and not more broadly to refer to the entire narrative portion of the speaker's confession.
17. **Rules of Evidence: Hearsay.** In determining admissibility under the residual hearsay exception, a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting the trustworthiness of a statement. A court may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as the nature of the statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement.
18. \_\_\_\_: \_\_\_\_\_. The residual hearsay exception is to be used rarely and only in exceptional circumstances.
19. **Criminal Law: Constitutional Law: Due Process: Rules of Evidence.** Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. However, the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.

20. **Constitutional Law: Witnesses: Self-Incrimination: Waiver.** A defendant's right to present a defense is not absolute and does not include the right to compel a witness to waive his or her Fifth Amendment privilege against self-incrimination.
21. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.

Appeal from the District Court for Douglas County: THOMAS A. ОТЕРКА, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

#### NATURE OF CASE

Tyrese A. Phillips appeals his convictions in the district court for Douglas County for second degree murder and use of a deadly weapon to commit a felony. Phillips generally claims that the court erred when it allowed a witness to assert his Fifth Amendment privilege against self-incrimination and failed to grant the witness use immunity, thereby preventing testimony that Phillips asserts was helpful to his defense. He claims in the alternative that the court should have admitted the witness' recorded statement to police under a hearsay exception. He claims the foregoing rulings denied him a complete defense. He also claims that a mistrial should have been declared or that a new trial should have been granted because the State knew a witness would testify falsely and withheld exculpatory evidence when it did not inform him prior to trial of certain statements made by a potential witness. We reject Phillips' assignments of error and affirm his convictions and sentences.

#### STATEMENT OF FACTS

The State charged Phillips with first degree murder and use of a deadly weapon to commit a felony as a result of

an incident in which Phillips shot and killed Joseph Piper. The incident involved a confrontation between two groups of people that included several high school students. Phillips and Piper were on opposite sides of the confrontation. There were various witnesses at trial who described the incident, including participants and observers. Each witness told his or her own version of events, but the following description incorporates testimony of these witnesses.

The confrontation came about as a result of a dispute between Phillips' friend, Mitch Harrington, and Piper's friend, Mario Gutierrez. Gutierrez was upset with Harrington because Harrington had argued with Gutierrez' girlfriend and called her derogatory names. It was decided that Gutierrez would fight Harrington after school on April 5, 2011. On that day, Harrington met at his house with Phillips and two other friends, one of whom was Tyler Weakly, who were to give Harrington a ride and be his backup for the fight. They left the house in Weakly's car. They had two baseball bats in the car, and Phillips was carrying a handgun. That same afternoon, Gutierrez and Piper went to the home of Jacob Jensen, where they and other friends of Jensen, including Duane Cox, helped Jensen move some furniture before they headed out for the fight.

Harrington and his friends arrived at a discount store's parking lot, where it had been determined the fight would take place. When they arrived, Gutierrez was present with a group of approximately 20 people who were there either to support Gutierrez or to watch the fight. Harrington and Gutierrez engaged in a brief fist fight but suspended the fight after learning that the police had been called to that location.

Harrington and Gutierrez decided to move to a local city park to continue the fight. Harrington's group, which included Phillips, arrived at the park before Gutierrez; they exchanged words with some of Gutierrez' friends who were already at the park, but no fighting broke out. About a half hour later, a truck and a Ford Expedition driven by Jensen and Cox, respectively, arrived. Several men, including Gutierrez, got out of the vehicles; some of them were carrying what looked to be bats or pipes. Gutierrez' group began

walking toward the vehicle in which Harrington's group sat. Members of Gutierrez' group were yelling things to antagonize Harrington's group.

Phillips got out of the vehicle. He pulled out his gun and cocked it as he walked toward Gutierrez' group. Phillips fired some shots into the air, but members of Gutierrez' group said that the gun was "fake" and they kept advancing toward Phillips. Piper, who was part of Gutierrez' group, was yelling and waving his hands in the air as the group advanced toward Phillips. Phillips fired some more shots, this time into the ground. The shots caused dust and dirt to fly up, which in turn caused most members of Gutierrez' group to retreat to their vehicles. Piper was the sole member of the group who continued toward Phillips.

Piper and Phillips exchanged words, while Piper made gestures that some witnesses described as gang signs. When Piper began to return to the vehicles, Phillips ran up to him and put the gun to Piper's head. They exchanged more words before Phillips stepped back and shot Piper in the chest. Piper immediately fell to the ground. Phillips stood over Piper and fired more shots at him as he lay on the ground. One witness testified that Phillips told the Gutierrez group to "'[c]ome pick up your dead homey.'"

Weakly was driving the vehicle that was occupied by members of Harrington's group. Weakly drove near Phillips, and Phillips got into the vehicle. The vehicle took off at a high rate of speed. Members of Gutierrez' group took off after them, but the vehicle driven by Weakly eventually lost them. Weakly took Harrington and Phillips to Phillips' home.

Piper died from the gunshot wounds, and Phillips was arrested. At Phillips' trial, the State presented testimony from various witnesses, including witnesses who had participated in or had seen the confrontation between the two groups.

Phillips' theory of defense was that he acted in self-defense and in defense of others and, alternatively, that if he was guilty of a crime, it was the lesser offense of manslaughter. Key to Phillips' defense were his claims that Piper had a gun and that he aimed it at Phillips. In his defense, Phillips presented several witnesses and testified himself.

Phillips testified, *inter alia*, that before he got out of the vehicle and as Piper and the others were advancing toward the vehicle, Piper motioned to his waistband and lifted his shirt. Phillips saw a black handle. He got out of the car and fired shots into the air, but the other group said he was shooting blanks and kept advancing while yelling derogatory terms, including racial slurs, at Phillips. He shot at the ground to show them that the gun was real. While some of the group retreated, Piper was “patting his waistline saying something,” which action Phillips described as “gesturing that he wanted to shoot.” Phillips started to retreat, but someone from the other group yelled a derogatory term at Phillips and he turned. Phillips testified that he saw Piper aiming a gun at him. Phillips fired his gun at Piper.

Contrary to the testimony of other witnesses, Phillips testified that he stopped shooting when Piper hit the ground. A witness for the State who conducted the autopsy testified that six bullets hit Piper and that he died from multiple gunshot wounds. Phillips testified that he ran up to check Piper’s condition and that he told Piper’s friends to get him to a hospital. Phillips started to back up, and he saw Gutierrez and one of his friends run up to Piper and take the gun from Piper. Weakly then drove up to Phillips and told him to get in the car. Phillips did, and they left the park while being chased by the other group.

Because various witnesses had testified that Piper did not have a gun, Phillips attempted to bolster his defense by presenting testimony from Weakly that Weakly had seen Piper with a gun. Hours after the shooting on April 5, 2011, Weakly was arrested and questioned by police. Weakly gave the police a statement regarding the incident in which he stated, *inter alia*, that when Gutierrez’ group arrived at the park and was walking toward the vehicle occupied by Weakly, Phillips, and others, Piper lifted his shirt and displayed a gun in his waistband. Weakly also stated that Piper was showing gang signs and that Phillips shot Piper after Piper lifted his shirt a second time. After he gave his statement to police, Weakly was charged with being an accessory to a felony. The charge against Weakly was pending at the time of Phillips’ trial.

Phillips knew that Weakly planned to invoke his Fifth Amendment right against self-incrimination in order to avoid testifying at Phillips' trial. Therefore, Phillips made a showing to the court outside the presence of the jury in order to address issues regarding Weakly's testimony. During the trial, Phillips called Weakly as a witness. After giving his name and testifying that he had been charged as an accessory to a felony in connection with the charges against Phillips and that he had given a statement to police, Weakly asserted his Fifth Amendment right to remain silent and would not answer further questions. The court ruled that based on Weakly's invocation of his Fifth Amendment rights, the court would not require Weakly to answer Phillips' questions. Phillips later requested the court to order the State to grant use immunity to Weakly to allow Weakly to testify at Phillips' trial. The court refused the request.

When it was clear that Weakly would be unavailable as a witness due to his invocation of his Fifth Amendment rights, Phillips attempted to have a recording of Weakly's statement to police admitted into evidence. Phillips summarized the content of the recorded statement and argued that the statement was admissible as an exception to the hearsay rule. Phillips focused on Weakly's statement that Piper had a gun and specifically argued that the statement could be admitted either as a statement against penal interest or under the residual hearsay exception. The court ruled that Weakly's statement that he saw Piper had a gun did not expose Weakly to criminal liability and that therefore, the statement did not qualify as a statement against penal interest. The court further ruled that there were no equivalent guarantees of trustworthiness to make the statement admissible under the residual hearsay exception. The court concluded that the statement was inadmissible hearsay.

During Phillips' defense, he called Cox as a witness. Cox was a part of the group that included Gutierrez and Piper during the confrontation. Cox had been listed as a witness for the State, but he was not called by the State. Cox testified regarding the confrontation and stated that he and Jensen drove vehicles to the park. When Phillips asked whether Cox had any

weapons with him, Cox testified that he had a pipe. Phillips asked whether Cox saw anyone besides himself armed with any type of weapon. Cox testified that another member of his group had a pipe and that Jensen “had a pistol.” Phillips asked where the gun was located, and Cox testified, “It’s in his center console where he always has it.” Phillips asked how Cox was made aware that Jensen had a gun, and Cox replied, “Because I know [Jensen].”

Phillips unsuccessfully tried to question Cox regarding Cox’s interview with prosecutors before trial. Phillips made an offer of proof outside the presence of the jury. Phillips questioned Cox, who acknowledged that when he first talked to the police, he did not mention that Jensen had a gun. Cox also testified that “several weeks” before the trial, he spoke with the prosecutors and told them for the first time that Jensen had a gun.

After Cox was excused, Phillips moved for a mistrial based on prosecutorial misconduct. Phillips asserted that he learned for the first time during Cox’s testimony at trial that Cox had informed prosecutors that Jensen had a gun. He argued that the State learned of this fact before the trial and had an obligation to inform Phillips because the evidence was exculpatory and would support Phillips’ theory of defense that a member of Piper’s group had a gun at the confrontation. Phillips also contended that Cox’s testimony showed that Jensen, who had testified for the State, was lying when Jensen testified that he had removed his gun from the console of his vehicle and did not have a gun at the confrontation and that the State knew Jensen was lying when it presented his testimony. Phillips asserted he was denied effective cross-examination of Jensen because he did not know that Cox would testify that, contrary to Jensen’s testimony, Jensen had a gun. Phillips argued that the State did not call Cox as a witness because it knew Cox would testify that Jensen had a gun.

The State argued in response that Cox’s statement before trial and testimony at trial were merely that he assumed Jensen had a gun in the console of his vehicle because he had seen one there at other times. The State argued it did not have a duty to disclose Cox’s statement before trial because Cox did

not tell the State that Jensen possessed, displayed, or used a gun during the confrontation. The State further noted that Jensen had testified that he had a gun that he normally kept in his vehicle, but that he took it out and put it in his house before he went to the fight. The court overruled Phillips' motion for a mistrial.

At the end of the trial, the jury acquitted Phillips of first degree murder but found him guilty of second degree murder and use of a deadly weapon to commit a felony. Phillips moved for a new trial based in part on the court's exclusion of Weakly's statement and the court's overruling his motion for a mistrial. The court overruled the motion for a new trial and sentenced Phillips to imprisonment for consecutive terms of 50 to 60 years for second degree murder and 25 to 30 years for use of a deadly weapon to commit a felony.

Phillips appeals.

### ASSIGNMENTS OF ERROR

Phillips claims that the district court erred when it (1) allowed Weakly to invoke the Fifth Amendment to avoid testifying at trial and in particular that Weakly saw that Piper had a gun, (2) denied Phillips' request to grant use immunity to Weakly to allow him to testify in Phillips' defense, (3) concluded that the recording of Weakly's statement was not admissible as a statement against penal interest, (4) concluded that the recording of Weakly's statement was not admissible under the residual hearsay exception, (5) denied him his constitutional right to present a complete defense when he was not allowed to present Weakly's testimony that Piper had a gun, and (6) overruled his motion for a mistrial and his motion for a new trial based on the State's withholding its knowledge before trial that Cox had stated that Jensen had a gun.

### STANDARDS OF REVIEW

[1] A court's decision to allow a witness to invoke his or her Fifth Amendment right against self-incrimination is reviewed for an abuse of discretion. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[2,3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Valverde*, ante p. 280, 835 N.W.2d 732 (2013). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Id.*

[4] Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds. See *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

[5] Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to hearsay rulings under the residual hearsay exception. See *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[6,7] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id.*

[8] Whether to grant a motion for mistrial is within the trial court's discretion, and this court will not be disturb its ruling unless the court abused its discretion. *State v. Dixon*, ante p. 334, 837 N.W.2d 496 (2013).

[9,10] An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *Id.*

## ANALYSIS

*Fifth Amendment: Court Did Not Err  
When It Allowed Weakly to Invoke  
His Fifth Amendment Privilege.*

Phillips first claims the district court erred when it allowed Weakly to invoke the Fifth Amendment to avoid testifying at trial. Phillips makes clear that the evidence he sought from Weakly would have been Weakly's testimony to the effect that Weakly saw that Piper had a gun. Because Weakly's testimony regarding the incident, including testimony that Piper had a gun, would have provided a link in the chain of evidence which exposed Weakly to criminal liability, we conclude that the court did not err when it allowed Weakly to invoke the Fifth Amendment and refuse to testify at Phillips' trial.

[11,12] The state and federal Constitutions provide that no person shall be compelled to give evidence against himself or herself of an incriminating nature. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). The U.S. Supreme Court has stated that the Fifth Amendment "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Thus, unlike the analysis regarding admissibility under the hearsay exception for statements against penal interest under Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008) discussed below, wherein we parse the statement for admissible and nonadmissible portions of evidence, see *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), the analysis under the Fifth Amendment ordinarily examines an entire line of questioning to determine whether to exclude the testimonial evidence based on privilege. See *Hoffman, supra*. Further, the Fifth Amendment privilege not only permits a person to refuse to testify against himself or herself during a criminal trial in which he or she is a defendant, but also grants him or her the privilege to refuse to answer questions put to him or her in any other proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him or her in future criminal proceedings. *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998) (citing

*Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986)).

[13] While a witness may invoke the Fifth Amendment to avoid answering questions, the witness' assertion of the privilege does not by itself establish the risk of incrimination; instead, the court must make inquiry to determine itself whether answering the questions would raise Fifth Amendment concerns. See *Robinson, supra*. Because of the constitutional dimension of the privilege, and consistent with *Hoffman, supra*, we have stated that when a court inquires into the propriety of an invocation of the Fifth Amendment privilege, the guarantee against compulsory self-incrimination must be accorded a liberal construction. *Robinson, supra*.

[14] The privilege against compulsory self-incrimination afforded by the Fifth Amendment "not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." *Hoffman*, 341 U.S. at 486. Accord *Robinson, supra*. It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *Robinson, supra*.

When Phillips called Weakly as a witness in his defense, Weakly gave his name and testified that he had been charged as an accessory to a felony in connection with the charges against Phillips and that he had given a statement to police. Weakly then asserted his Fifth Amendment right to remain silent and would not answer further questions. Following argument by counsel and upon due consideration, the court ruled that because Weakly had invoked his Fifth Amendment privilege, the court would not require Weakly to answer any more of Phillips' questions regarding the incident.

In the present case, Weakly was charged with being an accessory to the crimes for which Phillips was being tried. Therefore, questions and answers that might tend to incriminate Weakly of such charge are subject to Weakly's invocation of the Fifth Amendment privilege. Phillips' argument on appeal focuses on Weakly's anticipated testimony that Piper had a

gun at the time of the incident. Phillips contends that even if other matters to which Weakly might have testified could have incriminated Weakly, testimony that Piper had a gun, standing alone, would not have incriminated Weakly of anything in particular and therefore, Weakly should not have been allowed to invoke his Fifth Amendment privilege to avoid answering that specific question. We reject Phillips' argument because, although the specific statement may not in itself have incriminated Weakly, the testimony was inextricably tied with other statements which would incriminate Weakly.

At the time of Phillips' trial, Weakly was facing the charge of being an accessory to the felony for which Phillips was being tried. The centerpiece of the State's anticipated case against Weakly was that Weakly was present during the incident and in particular drove Phillips away from the scene. Any testimony by Weakly that would place him at the scene of the shooting would be an admission that he was present when the incident occurred, and such admission would be powerful evidence in a proceeding against Weakly. Weakly could not testify that he saw Piper had a gun during the confrontation without also providing explicit testimony that placed him at the scene of the shooting. The narrative which Phillips sought through the testimony by Weakly would provide a link in the chain of evidence that could incriminate Weakly as an accessory to the felony for which Phillips was being tried.

Giving, as we must, a liberal construction to the guarantee against compulsory self-incrimination, we conclude that testimony by Weakly that he saw that Piper had a gun was covered by Fifth Amendment protection and that therefore, the district court did not abuse its discretion when it allowed Weakly to invoke his Fifth Amendment privilege. We find no merit to this assignment of error.

*Immunity: Court Did Not Err When  
It Refused to Initiate and Grant  
Weakly Use Immunity in Order  
to Force Him to Testify.*

Phillips claims the district court erred when it denied his request that the court grant use immunity to Weakly to allow

him to testify in Phillips' defense. We conclude that because the court cannot grant immunity without a request from the prosecutor, the court did not err when it refused to initiate and grant such immunity.

Once the court concluded that it would allow Weakly to invoke the Fifth Amendment to avoid testifying that he saw Piper had a gun, Phillips requested the court to order the State to grant use immunity to Weakly which would allow Weakly to testify at Phillips' trial without fear that his testimony would be used against Weakly in a future proceeding. The prosecutor did not move the court to grant immunity to Weakly. Immunity was not granted. The court refused Phillips' request.

Phillips' argument relies in part on Neb. Rev. Stat. § 29-2011.02 (Reissue 2008) which provides:

Whenever a witness refuses, on the basis of the privilege against self-incrimination, to testify or to provide other information in a criminal proceeding . . . , the court, on motion of the county attorney [or] other prosecuting attorney . . . may order the witness to testify or to provide other information. The witness may not refuse to comply with such an order of the court on the basis of the privilege against self-incrimination, but no testimony or other information compelled under the court's order or any information directly or indirectly derived from such testimony or other information may be used against the witness in any criminal case except in a prosecution for perjury, giving a false statement, or failing to comply with the order of the court.

[15] Phillips' reliance on § 29-2011.02 as support for his argument is misplaced. Given the facts, § 29-2011.02 does not apply directly to the present case, because it was Phillips rather than the State who requested the order. We have stated that absent a motion by the county attorney or other prosecuting attorney, a trial court lacks authority to grant immunity and order a witness to testify. *State v. Starks*, 229 Neb. 482, 427 N.W.2d 297 (1988).

Phillips nevertheless contends that a court has inherent authority to grant a witness use immunity. In support of his argument, Phillips cites *Government of Virgin Islands v.*

*Smith*, 615 F.2d 964 (3d Cir. 1980), wherein the U.S. Court of Appeals for the Third Circuit held that a trial court could itself grant judicial immunity to a witness in order to vindicate the defendant's constitutional right to a fair trial. The Third Circuit limited use of such authority to two situations: (1) when the government's decision to not grant immunity is made with the deliberate intention of distorting the judicial factfinding process and (2) when the defendant is prevented from presenting exculpatory evidence crucial to the defendant's case.

This court has previously addressed arguments urging adoption of the holding in *Government of Virgin Islands, supra*. In *Starks, supra*, we decided that it was not necessary to consider whether the holding should be adopted because the facts of the case at hand did not present either of the two situations in which the Third Circuit held that the authority could be exercised. In *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006), we addressed a similar argument and noted that other federal courts of appeal had held that trial courts did not have inherent authority to grant use immunity to a defendant's witnesses and that no other federal circuit had followed the Third Circuit's holding in *Government of Virgin Islands*. We stated in *Robinson* that "[t]rial courts in Nebraska do not have inherent authority to confer immunity," 271 Neb. at 726, 715 N.W.2d at 557, and we concluded that the trial court did not err when it refused to order the State to grant immunity to witnesses who invoked their right against self-incrimination.

We note that the Third Circuit recently disapproved of its holding in *Government of Virgin Islands, supra*, to the effect that a trial court has inherent authority to grant a witness judicial immunity. See *U.S. v. Quinn*, 728 F.3d 243 (3d Cir. 2013). On August 14, 2013, the Third Circuit filed *Quinn* in which it noted, as this court had observed in *Robinson*, that it was the only federal court of appeals that had recognized judicial use immunity for witnesses and that other courts had rejected it. The Third Circuit reconsidered its holding in *Government of Virgin Islands* in terms of the separation of powers between branches of government and concluded that "[a]s Congress

has given the power to immunize a witness solely to the Executive Branch, it is not a power courts can exercise.” 728 F.3d at 254.

Therefore, to the extent that Phillips relies on *Government of Virgin Islands, supra*, as support for the proposition that the trial court had authority to grant Weakly use immunity, such argument is unavailing. Similar to the Third Circuit’s reasoning in *Quinn, supra*, and consistent with our opinion in *Robinson, supra*, we conclude that because the Legislature in § 29-2011.02 has given courts the power to immunize a witness solely upon the request of the prosecutor, it is not a power the court can exercise upon the request of the defendant or upon its own initiative.

For completeness, we note that although the Third Circuit in *Quinn* abandoned judicially initiated use immunity as a remedy, it continued to use the standards set forth in *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980), to determine whether the government has violated the defendant’s right to a fair trial when a witness is not immunized. Phillips’ assignment of error in this case with regard to immunity is limited to an argument that the district court erred when it denied his request to initiate and grant Weakly use immunity. In a separate assignment of error, Phillips asserts that his constitutional due process right to present a complete defense was violated when he was not allowed to present Weakly’s testimony that Piper had a gun. We consider that separate assignment of error below.

We conclude that the district court did not err when it refused Phillips’ request to grant Weakly use immunity, and we reject this assignment of error.

*Hearsay Exception: Court Did Not Err When It  
Concluded That Weakly’s Recorded Statement  
Was Not Admissible as an Exception to the  
Rule Against Hearsay as a Statement  
Against Penal Interest.*

Phillips next claims the district court erred when it concluded that Weakly’s statement to the effect that Piper had a gun made to police in an extended recorded statement was not

admissible as a statement against Weakly's penal interest. See § 27-804(2)(c). We determine that the remark that Piper had a gun was not a self-inculpatory statement on Weakly's part and that therefore, the court did not err when it concluded that this hearsay statement was not admissible as an exception to the rule against hearsay as a statement against the penal interest of the declarant, Weakly.

Once it was clear that Weakly would not be required to testify at Phillips' trial, Phillips attempted to have Weakly's recorded statement to police admitted into evidence. Although the entire statement covered various aspects of the incident during which Phillips shot Piper, Phillips' argument is focused on the specific remark that Weakly saw that Piper had a gun. The parties do not appear to dispute that the recorded statement was hearsay or that Weakly, as the declarant, was unavailable as a witness at Phillips' trial due to his successful invocation of his Fifth Amendment right against self-incrimination. Instead, the argument on appeal is whether Weakly's pretrial statement that Piper had a gun met one of the hearsay exceptions urged by Phillips—as a statement against penal interest, § 27-804(2)(c), or, as we discuss later in this opinion, under the residual hearsay exception, § 27-804(2)(e). The district court rejected both arguments and concluded that the remark was inadmissible hearsay. We agree with both determinations.

Under Neb. Rev. Stat. § 27-802 (Reissue 2008), hearsay is not admissible unless it meets an exception under the rules, and under § 27-804, certain types of hearsay are admissible if the declarant is unavailable as a witness. The statement under consideration is hearsay, and Weakly was unavailable as a witness at Phillips' trial. See, *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011) (stating that declarant who invoked Fifth Amendment privilege was unavailable as witness); § 27-804(1)(a) (unavailability includes situation in which declarant is exempted from testifying on ground of privilege).

Phillips argued that Weakly was unavailable and that Weakly's hearsay statement to police qualified as a statement

against penal interest and was therefore “not excluded by the hearsay rule.” § 27-804(2). Under § 27-804(2)(c), hearsay that is admissible if the declarant is unavailable includes “[a] statement which . . . at the time of its making . . . so far tended to subject him to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.” This type of statement is commonly referred to as a “statement against penal interest.” As an initial matter, to qualify as a statement against penal interest under § 27-804(2)(c), the statement must be self-inculpatory. See *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994). Phillips contends that Weakly’s statement that Piper had a gun is self-inculpatory.

Section 27-804(2)(c) also provides that “[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” Phillips offered Weakly’s statement to exculpate himself, and he therefore needed to show that, in addition to subjecting Weakly to criminal liability, corroborating circumstances clearly indicated the trustworthiness of Weakly’s statement.

In his appellate brief, Phillips contends that Weakly’s remark that the victim had a gun, which is contained within Weakly’s extended narrative recorded by the police, should have been admitted under § 27-804(2)(c) as a statement against penal interest. The State disagrees and asserts that the remark to the effect that Piper had a gun is not a statement against Weakly’s penal interest. Phillips asserts that the State’s disagreement “amplifies the absurdity of the situation[.] On[] the one hand [the State urges that] the statement is precluded on privilege grounds because it is inculpatory to Weakly; but at the same time [the State urges that] it is precluded because it is not really a statement against penal interest.” Brief for appellant at 39-40. Phillips also seems to argue that because the recorded statement as a whole is harmful to Weakly, then it follows that any content within the complete narrative is a statement against

penal interest and, therefore, admissible. Phillips misperceives the application of the statutory statement against penal interest exception in § 27-804(2)(c).

Unlike the expansive construction accorded individual remarks under examination for exclusion pursuant to the constitutional privilege against self-incrimination discussed earlier in this opinion, individual remarks under examination pursuant to the statutory hearsay exception in § 27-804(2)(c) must meet the test of “whether the particular remark at issue (and *not* the extended narrative) meets the standard set forth in the Rule [concerning admissibility of statements against penal interest].” See *Williamson*, 512 U.S. at 607 (Scalia, J., concurring). “The question under Rule 804(b)(3) [equivalent to § 27-804(2)(c)] is always whether the statement was sufficiently against the declarant’s penal interest ‘that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true’ . . . .” *Williamson*, 512 U.S. at 603-04 (quoting Fed. R. Evid. 804(b)(3)). As an example of a statement against penal interest, the *Williamson* Court stated: “[A] declarant’s squarely self-inculpatory confession—‘yes, I killed X’—will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a co-conspirator liability theory. See *Pinkerton v. United States*, 328 U. S. 640, 647[, 66 S. Ct. 1180, 90 L. Ed. 2d 1489] (1946).” 512 U.S. at 603.

[16] “Statement” in § 27-804(2)(c) is a word of art; a “statement” within the meaning of § 27-804(2)(c) is a specific individual statement that a proponent offers into evidence rather than the entire narrative of which the statement is a part. We have noted that “§ 27-804(2)(c) uses the term ‘statement’ in a narrow sense to refer to a specific declaration or remark incriminating the speaker and not more broadly to refer to the entire narrative portion of the speaker’s confession.” *State v. Sheets*, 260 Neb. 325, 337, 618 N.W.2d 117, 128 (2000), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). Our jurisprudence in this area follows that of the U.S. Supreme Court which has said that the federal equivalent of § 27-804(2)(c), rule 804(b)(3), “does not allow admission of non-self-inculpatory statements, even if

they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume . . . that a statement is self-inculpatory because it is part of a fuller confession.” *Williamson v. United States*, 512 U.S. 594, 600-01, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994). The Court reasoned in *Williamson* that “[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession’s non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth . . . .” 512 U.S. at 599-600.

The reasoning behind the hearsay exception for a statement against penal interest is that a person would not make such a statement unless the statement were true. However, it is possible that within the context of a confession, admission, or other statement generally against a person’s penal interest, a person might make statements that would tend to lessen his or her culpability. We believe that under the reasoning in *Williamson*, it logically follows that such statements do not carry the same indication of trustworthiness as a statement that clearly exposes a person to criminal liability; while there is no clear motivation to lie about a fact that could expose one to criminal liability, there is clear motivation to lie about something that lessens one’s culpability.

In the present case, the statement that Phillips sought to put into evidence was Weakly’s specific remark that he saw that Piper had a gun. Under *Williamson*, we look at the particular remark; and the comment that Piper possessed a gun standing alone would not tend to subject Weakly to criminal liability. The specific statement was not a statement against Weakly’s penal interest and to the contrary, and viewing the remark “in light of all the surrounding circumstances,” see *Williamson*, 512 U.S. at 604, the statement would tend to lessen Weakly’s criminal liability as an accessory to a felony committed by Phillips. Contrary to the dissent’s view, Weakly had a motive to fabricate lies. After all, driving an individual away from a crime scene who has a halo of self-defense is better for Weakly than driving an individual away who is an unprovoked aggressor. Even a person not trained in the law, such as Weakly, would so assume. Piper’s possession of a gun would tend to

lessen or eliminate Phillips' culpability and, by extension, Weakly's culpability as an accessory.

While parts of Weakly's narrative to police were against his penal interest, the specific remark that Phillips sought to have admitted—that Piper had a gun—was not, standing alone, sufficiently against Weakly's penal interest that a reasonable person in Weakly's position would not have made it unless believing it to be true. The statement did not qualify as hearsay that is admissible pursuant to § 27-804(2)(c). We therefore determine that the district court did not err when it ruled that the offered statement was not admissible as a statement against penal interest. We reject this assignment of error.

*Hearsay Exception: Court Did Not Err When It Concluded That Weakly's Recorded Statement Was Not Admissible as an Exception to the Rule Against Hearsay Under the Residual Hearsay Exception.*

Phillips also claims the district court erred when it concluded that Weakly's recorded statement was not admissible under the residual hearsay exception. See § 27-804(2)(e). We conclude that because the statement that Piper had a gun tended to lessen Weakly's culpability, it did not have the required level of trustworthiness required by this exception, and that the court did not abuse its discretion when it determined it was not admissible under the residual hearsay exception.

The residual hearsay exception found at § 27-804(2)(e) provides:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this

exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

[17,18] In determining admissibility under the residual hearsay exception, a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting the trustworthiness of a statement. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). A court may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as the nature of the statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement. *Id.* The residual hearsay exception is to be used rarely and only in exceptional circumstances. *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

Under both the penal interest exception and the residual hearsay exception, one offering hearsay evidence must show that the circumstances of the making of the statement indicate that such statement is trustworthy. *Epp, supra*. Under *Epp*, we examine the admissibility of Weakly's comment under the residual hearsay exception by comparing the remark to the penal interest exception. As we have explained above, the specific statement that Piper had a gun does not suggest trustworthiness because the remark does not support charges against Weakly and instead tends to lessen Phillips' and thus Weakly's culpability. Therefore, there is greater motivation for fabrication and consequently less indication that the statement was trustworthy.

Because the statement lacks trustworthiness, we determine that the district court did not abuse its discretion when it determined that the statement was not admissible under the residual hearsay exception. We reject this assignment of error.

*Court Did Not Violate Phillips' Right to Present a Complete Defense.*

[19] Phillips claims that the district court denied him his constitutional right to present a complete defense. Phillips' argument centers on the court's rulings that prevented him from presenting evidence that Weakly saw Piper had a gun, either through Weakly's testimony or through admission of his statement to police. He argues that these rulings violated his right to present a complete defense. We have stated that whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008) (citing *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). However, "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). We conclude that because the court made appropriate rulings with regard to Weakly's testimony and his hearsay statement, and because Phillips presented evidence of the defense of his choice, the court did not violate Phillips' right to present a complete defense.

[20] We first address the court's ruling that allowed Weakly to invoke his Fifth Amendment privilege to avoid testifying at Phillips' trial. Phillips argues that he was prevented from presenting a complete defense because Weakly was not required to testify at trial that Piper had a gun. However, it has been stated that a defendant's right to present a defense is not absolute and does not include the right to compel a witness to waive his or her Fifth Amendment privilege against self-incrimination. *U.S. v. Serrano*, 406 F.3d 1208 (10th Cir. 2005) (citing holdings

from various federal circuit courts of appeal). The U.S. Court of Appeals for the 10th Circuit noted in *Serrano* that there may be a due process violation if the government substantially interferes with a witness' decision and causes the witness to decide against testifying. Phillips makes no assertion of such coercion. We therefore conclude that it was not a violation of Phillips' right to present a complete defense when, as we have determined above, the court properly allowed Weakly to invoke his Fifth Amendment privilege.

We next address the court's ruling that excluded Weakly's recorded statement under the hearsay rules and, in particular, the ruling that rejected Phillips' argument that Weakly's testimony was a statement against penal interest. Phillips' argument relies heavily on *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), in which the U.S. Supreme Court concluded that a defendant's right to present a complete defense was violated when the trial court used an evidentiary rule to exclude evidence offered by the defendant to show that another person had committed the crime. In *Holmes*, the Court concluded that the South Carolina rule was arbitrary because, as applied, if the prosecutor's case was strong enough, the evidence of third-party guilt sought to be introduced by the defendant was excluded under the rule, regardless of the merits of such third-party guilt evidence. Under *Holmes*, proper application of well-established rules of evidence are acceptable but "the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." 547 U.S. at 326.

In *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003), we rejected an argument that due process required the trial court to allow the defense to present a hearsay statement. We noted that in *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), the U.S. Supreme Court had held that due process may require admission of a third party's statements against penal interest exculpating the accused where the statements were made under circumstances that provided considerable assurance of their reliability. We further noted that Nebraska had codified the exculpatory penal

interest exception in § 27-804(2)(c) and that the requirement in subsection (2)(c) that there exist corroborating circumstances which clearly indicate the trustworthiness of the proffered hearsay was substantially similar to the *Chambers* requirement of considerable assurance of reliability. We concluded in *Lotter* that the due process analysis was encompassed within the evidentiary statute and that therefore, because the evidence was properly excluded under the statutory framework, its exclusion did not violate due process requirements.

In the present case, because we have determined that Weakly's statement was properly excluded under the hearsay rule, we similarly conclude that the exclusion of the evidence did not violate Phillips' right to present a complete defense. Upon our review of the record, we also note that Phillips was able to pursue his choice of defense in general and, in particular, present evidence contrary to that of the prosecution's case through his own testimony in which he testified that Piper had a gun.

We conclude that neither the court's ruling allowing Weakly to invoke his Fifth Amendment privilege nor the court's ruling excluding the recorded statement under the established hearsay rules violated Phillips' right to present a complete defense. We reject this assignment of error.

*Court Did Not Err When It Overruled  
Phillips' Motions for a Mistrial  
and for a New Trial.*

Phillips finally claims the district court erred when it overruled his motion for a mistrial and his motion for a new trial based on Phillips' assertion that the State withheld its knowledge before trial of Cox's statement that Jensen had "a gun with him at the park." Brief for appellant at 48. We determine that the court did not abuse its discretion when it determined that there was no prosecutorial misconduct that required either a mistrial or a new trial.

In his arguments in favor of both the motion for a mistrial and the motion for a new trial, Phillips asserted that it was a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when the State did not inform him

before trial of Cox's statements about Jensen's gun. We have described the requirements of *Brady* as follows:

Under *Brady v. Maryland*, a prosecutor who fails to turn over evidence "favorable to an accused upon request violates due process where the evidence is material . . . to guilt." The Court expanded this rule in *United States v. Bagley*[, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)]. Under *Bagley*, prosecutors have a duty to present material exculpatory evidence even if defense counsel never requests the evidence. Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability of a different result is shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.

*State v. Jackson*, 275 Neb. 434, 449, 747 N.W.2d 418, 433-34 (2008). Phillips contends that Cox's statement about Jensen's gun was favorable to him because it supported his theory of self-defense, namely, that because Jensen brought a gun to the park, Piper had access to a gun. Phillips asserts that the jury could have inferred that the gun Phillips testified was in Piper's possession was Jensen's gun. He also argues that the State presented testimony that it knew was false when it allowed Jensen to testify that he did not bring a gun to the scene of the confrontation.

The district court rejected these arguments, and upon review, we determine that it did not abuse its discretion in so ruling. Fundamental to Phillips' argument is his characterization of Cox's statement to law enforcement prior to trial and his testimony at trial. We therefore describe and recite from the record.

In their statements to law enforcement, both Cox and Jensen denied possessing a firearm during the altercation that led to Phillips' killing Piper. Jensen testified at trial that he removed his firearm from his vehicle prior to driving to the park. Cox testified for the defense at trial as follows:

Q Did you see any of the individuals you were with besides you and [Piper] exit vehicles?

A No.

Q Did . . . Jensen ever — to your knowledge did you ever see him outside of the vehicle?

A No.

Q Did you see anyone besides yourself armed with any type of weapon?

A Yeah.

Q Who?

A Well Jeremy [Hilliard] had the pipe and then [Jensen] had a pistol.

Q Okay. And where did he have the pistol?

A It's in his center console where he always has it.

Q And how were you made aware that he had it?

A Because I know [Jensen].

Q Okay. Did you see him out — you said you never saw him outside the car, though?

A No, no. He never got out.

Following this testimony, Phillips then attempted to ask Cox if he told the prosecutors “anything about seeing . . . Jensen with a pistol” when Cox met with them a week or two prior to trial, but this line of questioning was excluded as hearsay. Phillips then made an offer of proof outside the presence of the jury.

In Phillips' offer of proof, Cox testified as follows:

Q Okay. With regard to the questions and answers I want to ask . . . you acknowledge that when the police talked to you on that day you didn't mention anything about any of you or your friends having a pistol; correct?

A Yes.

Q Yesterday you testified that, in fact — [be]cause one of your friends did have a pistol; right?

A Yes.

Q And you indicated that you spoke to the prosecutors about this matter several weeks ago before trial started; correct?

A Yes.

Q And where did that take place?

A At my place of employment.

Q Okay. And during that interview with the prosecutors, did you, for the first time, tell them that Jensen did have a gun?

A Yes.

Q So they knew that, then; right? But that's the first time you had admitted that; true?

A Yes.

Following this offer, the court reaffirmed its ruling excluding testimony regarding the pretrial interview with prosecutors and Phillips then moved for a mistrial based on prosecutorial misconduct. Phillips argued that the prosecutors (1) knew before putting Jensen on the stand that contrary to what was in the reports, he had a gun and would be lying under oath, and (2) never informed him that Cox stated that Jensen had a gun, which information was exculpatory.

The State opposed the motion for a mistrial and argued that, like his testimony on direct examination, Cox simply told the prosecutors that he assumed that Jensen had a gun with him at the park because it was always in the console of Jensen's vehicle. The State asserted that Cox never told the prosecutors that he actually saw Jensen use or display a gun at the park; thus there was no information required to be disclosed to Phillips.

The district court found that Cox testified that knowing Jensen's habits, Cox assumed that Jensen had the gun in the console of his vehicle at the park, but that there was no testimony from Cox that Jensen actually had it out during the incident at the park. The court then overruled the motion for a mistrial, stating that there had been no substantial miscarriage of justice given the state of the record. Following the verdict, Phillips moved for a new trial, arguing the same position he presented in his motion for a mistrial.

The district court entered an 11-page order denying Phillips' motion for new trial. In overruling Phillips' motion, the court agreed with the State's characterization of Cox's testimony to the effect that Cox did not state that he saw Jensen bring a gun to the confrontation. Instead, Cox's trial testimony was that he knew Jensen had a gun in his vehicle because he knew Jensen—meaning he knew Jensen normally carried a gun in

the console of his vehicle. Further, Cox's testimony in the offer of proof when read as a whole did not mean that Cox told prosecutors pretrial that Cox saw Jensen bring a gun to the park.

The court's description of Cox's testimony is consistent with the record. Cox's trial testimony was not that he actually knew Jensen had a gun at the confrontation, but, rather, that he knew Jensen normally carried a gun in his vehicle. Cox's testimony was consistent with that of Jensen. Jensen testified that he normally kept a gun in his vehicle; however, Jensen testified that he left it at home before going to the park for the confrontation. Cox's statement to the prosecutors did not give the State reason to think that Jensen's testimony was false.

[21] Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013). Phillips has not shown any prosecutorial misconduct that resulted in a substantial miscarriage of justice. Phillips has not shown that the State believed Jensen would give false testimony or a reasonable probability that production of Cox's statement to prosecutors would have caused a different result in the trial. We therefore determine that the district court did not abuse its discretion when it overruled his motion for a mistrial. We similarly conclude that the court did not abuse its discretion when it overruled his motion for a new trial made on the same basis. We reject this assignment of error.

### CONCLUSION

We determine that the district court did not err when it allowed Weakly to invoke his Fifth Amendment privilege and when it refused to initiate and grant Weakly use immunity. We also determine that the court did not err when it determined that Weakly's recorded statement was excluded as hearsay evidence that was not admissible either as a statement against penal interest or under the residual hearsay exception. We further conclude that such rulings with regard to Weakly's testimony and his recorded statement did not violate Phillips' constitutional right to present a complete defense. We finally

determine that the court did not abuse its discretion when it overruled Phillips' motions for a mistrial and for a new trial. We therefore affirm Phillips' convictions and sentences for second degree murder and for use of a deadly weapon to commit a felony.

AFFIRMED.

CONNOLLY, J., dissenting.

The court's reasoning at the trial level and in the majority opinion is inherently inconsistent. As the majority opinion states, "Any testimony by Weakly that would place him at the scene of the shooting would be an admission that he was present when the incident occurred, and such admission would be powerful evidence in a proceeding against Weakly." If Weakly can invoke the Fifth Amendment because his statement is strong evidence of his guilt for charged and uncharged crimes, then a reasonable person would not have made the statement unless it were true. The district court's ruling put Phillips' defense into a legal cul-de-sac. The majority opinion closes the circle.

So I disagree that under rule 804(2)(c),<sup>1</sup> Weakly's statement was not a statement against his penal interest. It is true that a court must look at separate parts of a larger narrative to determine whether it was against the declarant's penal interest. But those statements should not lose their relationship to other statements in the narrative when determining their significance to a criminal prosecution. And I do not believe that in *Williamson v. United States*,<sup>2</sup> the U.S. Supreme Court intended to pervert the truth-seeking functions of trials by excluding relevant and trustworthy statements. The context in which Weakly made the statement shows that it is reliable because he had no motive to fabricate lies to curry favor with authorities, nor did he shift blame to others.

Currying favor and shifting blame was the focus of the Court's concern in *Williamson*. There, officers stopped the

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<sup>1</sup> See Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008).

<sup>2</sup> *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L.Ed.2d 476 (1994).

declarant, who had a significant quantity of cocaine in the trunk of his car. During custodial questioning, he admitted to his involvement in a drug conspiracy, but attempted to downplay his role and shift blame to the defendant, as the “big fish” in the scheme. The declarant told an investigator that the cocaine belonged to the defendant and that he was transporting it for the defendant. The investigator had promised to report his cooperation to the prosecutor. So the declarant’s statement tended to exclusively implicate someone else in criminal acts. The statement did little to subject the declarant to criminal liability because he had already confessed to his involvement.

The Court reversed the judgment upholding the trial court’s admission of the declarant’s statement as against penal interest. It concluded that statements against penal interest are reliable because “reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.”<sup>3</sup> In contrast, “[s]elf-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.”<sup>4</sup> So the Court held that the exception “does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.”<sup>5</sup>

But the Court noted that “[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.”<sup>6</sup> A court must view the statement in context to determine whether it is self-inculpatory or not: “Even statements that are on their face neutral may actually be against the declarant’s interest.”<sup>7</sup>

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<sup>3</sup> *Id.*, 512 U.S. at 599.

<sup>4</sup> *Id.*, 512 U.S. at 600.

<sup>5</sup> *Id.*, 512 U.S. at 600-01.

<sup>6</sup> *Id.*, 512 U.S. at 603.

<sup>7</sup> *Id.*

Under Nebraska's rule 804(2)(c) and the federal counterpart, the declarant need not have confessed to the crime charged against the defendant. Instead, when the statement was made, the statement must have so tended to subject the declarant to criminal liability that a reasonable person would not have made it unless believing it to be true. "[T]his question can only be answered in light of all the surrounding circumstances."<sup>8</sup> And this court has previously considered this question in determining whether the State's offer of a declarant's custodial statements violated the Confrontation Clause.

As we know, in 2004, the Confrontation Clause landscape shifted when the U.S. Supreme Court decided *Crawford v. Washington*.<sup>9</sup> It held that the Confrontation Clause bars the admission of testimonial hearsay unless the witness is unavailable and the defendant had previous opportunity to cross-examine the witness, regardless of whether a court considers such statements reliable. Before *Crawford*, courts could consider whether the statement contained adequate indicia of reliability to assess the truthfulness of the evidence even without the opportunity for cross-examination.<sup>10</sup> And in *State v. Hughes*,<sup>11</sup> we considered whether a statement against penal interest had particularized guarantees of trustworthiness.

In *Hughes*, we recognized that a statement made in response to police interrogation generally does not have inherent guarantees of reliability and trustworthiness because the declarant may be trying to curry favor with the authorities. So a court must examine the totality of the circumstances surrounding the making of the statement. We stated that the relevant factors are whether the declarant was in police custody when the statement was made, whether the declarant had a motive to mitigate his own criminal liability, and whether the declarant made the statement in response to leading questions.

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<sup>8</sup> *Id.*, 512 U.S. at 604.

<sup>9</sup> *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

<sup>10</sup> See *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled, *Crawford*, *supra* note 9.

<sup>11</sup> *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993).

As in *Williamson*, the declarant in *Hughes* implicated a third party. An investigating officer testified he told the suspect that he must be the shooter to scare him. In response, the suspect named the defendant as the shooter. The State sought to introduce this statement at trial. We held that the statement was unreliable and that its admission violated the Confrontation Clause. We concluded that the officer did not give the suspect a choice to admit his crimes and cooperate. Instead, he could only deny the officer's accusations and had a motive to lie and identify another person as the shooter, which motive could be explored only through cross-examination.

But the circumstances here are distinct from the facts in both *Williamson* and *Hughes*. Police officers arrested Weakly because they knew he was the driver. But an officer told Weakly early in the interrogation that investigators did not believe he was the shooter. And Weakly made his statement after the officer asked him to describe the events at the park, not in response to leading questions or accusations. In stating that Phillips shot Piper after Piper exposed a gun under his shirt, Weakly was only explaining the events that preceded Phillips' shooting Piper.

So unlike the declarant in *Williamson* and *Hughes*, Weakly did not attempt to shift blame to another participant. Nor did the State offer him leniency for providing evidence against Phillips. He had no motive to fabricate lies to minimize his role in the homicide or to curry favor with authorities.<sup>12</sup> Providing false information to the officers that conflicted with other reports would have forfeited any opportunity he had for leniency.

More important, Weakly made statements inculcating himself in Piper's murder when he did not know what charges would be brought against him because of his involvement in the altercation. The State later charged Weakly with being an accessory to a felony, but aiding and abetting first degree murder or conspiracy were clearly on the table when Weakly made these statements. As other courts have recognized, the test is whether the statement would be probative of guilt in a trial

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<sup>12</sup> See *Williamson*, *supra* note 2.

against the declarant.<sup>13</sup> And every statement that Weakly made showed his involvement and knowledge of the crime.

Weakly told the officers that he drove Phillips and others to a planned altercation. His statements showed that he knew Phillips had brought a gun intending to fight. He knew before Phillips left the vehicle that he was prepared to shoot someone and had done so. The record reflects that Weakly brought baseball bats for his friends to take with them. A reasonable person in Weakly's position would not have falsely admitted to participating in this crime knowing that his admission could subject him to criminal liability for a murder.<sup>14</sup>

Nor were his statements neutral in the context of the charges that the State could have filed; they would have been material evidence of his guilt. That is, the State could have used Weakly's statement that Phillips shot Piper after Piper exposed a gun to show Weakly's participation in a planned attack, even if he did not intend a murder. The prosecutor's arguments during the in camera hearing to determine whether Weakly could invoke his privilege against self-incrimination show that more serious charges could have been filed. She specifically argued that if Weakly testified, there were facts in the case that could subject him to further charges and that the State would use his testimony against him if he took the stand. And under a de novo review, I believe the record clearly shows that Weakly's statements implicated him in the charged crime as well as other potential charges.

In sum, *Williamson* held that the statement against interest exception does not apply when a coparticipant in a crime confesses in a manner that primarily diminishes his own culpability or shifts blame to another person. Weakly did neither. Nor should *Williamson* be read as condoning the parsing of a declarant's statement to the point that the declarant's criminal liability for the statement is lost. *Williamson* specifically

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<sup>13</sup> See, e.g., *U.S. v. Jinadu*, 98 F.3d 239 (6th Cir. 1996); *U.S. v. Garcia*, 897 F.2d 1413 (7th Cir. 1990); *United States v. Garriss*, 616 F.2d 626 (2d Cir. 1980); *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978).

<sup>14</sup> See, *U.S. v. Smalls*, 605 F.3d 765 (10th Cir. 2010); *U.S. v. Wexler*, 522 F.3d 194 (2d Cir. 2008); *U.S. v. Tocco*, 200 F.3d 401 (6th Cir. 2000).

directed courts to consider the context. It was not intended to exclude relevant statements where the declarant had no motive to lie. And this case illustrates that interpreting *Williamson* too broadly allows the State to manipulate which relevant evidence will come before the trier of fact.

Of course, under rule 804(2)(c), Weakly's statements must also be corroborated by circumstances indicating that they are trustworthy. But because the trial court did not rule on this issue, I would reverse, and remand for further proceedings.

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IN RE INTEREST OF MYA C. AND SUNDAY C.,  
CHILDREN UNDER 18 YEARS OF AGE.  
STATE OF NEBRASKA, APPELLEE,  
V. NYAMAL M., APPELLANT.

840 N.W.2d 493

Filed December 6, 2013. No. S-12-811.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
3. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** Juvenile court proceedings are special proceedings under Neb. Rev. Stat. § 25-1902 (Reissue 2008), and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child.
4. **Juvenile Courts: Parent and Child.** Under Neb. Rev. Stat. § 43-288 (Reissue 2008), a juvenile court has discretion to require a parent, among other things, to comply with a rehabilitation plan that will correct the conditions that led to the adjudication and to adequately provide for his or her child's needs.
5. **Juvenile Courts: Parental Rights: Appeal and Error.** A juvenile court order imposing a rehabilitation plan affects a parent's substantial right in a special proceeding and is appealable.
6. **Juvenile Courts: Final Orders: Time: Appeal and Error.** A juvenile court order that merely extends the time that the requirements of a previous order are in effect does not affect a substantial right or extend the time in which a party may appeal the original order.
7. **Juvenile Courts: Parental Rights: Appeal and Error.** A juvenile court order that adopts a case plan with a material change in the conditions for reunification with a parent's child is a crucial step in proceedings that could possibly lead to the termination of parental rights. Such orders affect a parent's substantial right in a special proceeding and are appealable.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, REGGIE L. RYDER, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Matt Catlett for appellant.

Joe Kelly, Lancaster County Attorney, and Daniel J. Zieg, for appellee.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

### SUMMARY

A parent cannot appeal from a juvenile court's dispositional order that merely extends the time that the requirements of a previous order are in effect.<sup>1</sup> This appeal raises the jurisdictional question whether a juvenile court's order is final and appealable when it changes a condition for reunification in a parent's rehabilitation plan. While the appellant, Nyamal M., was a minor ward herself, the juvenile court required her to continue her high school education. At a later review hearing—after Nyamal had aged out of the juvenile court system, dropped out of high school, and obtained a job—the juvenile court changed the rehabilitation plan and required her to actively pursue a high school diploma or a diploma through the GED program.

The Nebraska Court of Appeals determined that this order was not final and appealable because it essentially continued the juvenile court's previous orders. The Court of Appeals characterized her appeal as an impermissible collateral attack on its earlier orders.<sup>2</sup>

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<sup>1</sup> See, e.g., *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

<sup>2</sup> See *In re Interest of Mya C. & Sunday C.*, 20 Neb. App. 916, 835 N.W.2d 90 (2013).

We granted Nyamal's petition for further review from this decision. We conclude that the later order did not merely continue the terms of the previous rehabilitation plan. Instead, it imposed a materially different requirement for Nyamal's reunification with her children. We reverse the Court of Appeals' judgment and remand the cause with directions for the court to consider the merits of Nyamal's appeal.

### BACKGROUND

In July 2010, Nyamal, who is from Sudan, was an unmarried minor living in her mother's home with her daughters, Mya C. and Sunday C., who were ages 4 and 2. They were all three removed from the home, and Nyamal's daughters were adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) because of her neglect. During these proceedings, Nyamal lacked work authorization, although later court orders have required the Department of Health and Human Services to assist her with establishing her status as a resident alien.

### JUVENILE COURT'S DISPOSITIONAL AND REVIEW PROCEEDINGS

The disposition order required Nyamal to cooperate with family support services and therapy to learn to deal with stress and to parent her children appropriately. The disposition order also required Nyamal to "continue her education a[t] Lincoln High School" and "not switch her education plans without approval from the Department." Finally, the order required her to seek part-time employment to support her children.

In March 2011, the department placed Nyamal and her children in an apartment. The court's June review order continued the department's legal custody and placement with Nyamal. The court required Nyamal to "continue with her education at Bryan Community School." The record does not explain this change in schools. The other requirements from the disposition order were continued, including the requirement that Nyamal seek part-time employment.

The court's December 8, 2011, review order continued the same requirements that it had imposed in the June 2011 order.

In addition, the December order required the department to assist Nyamal with documenting her resident alien status. Later in December, after the court issued its order, Nyamal turned 19 and aged out of the juvenile court system.

In March 2012, the department placed the children in a foster home because of Nyamal's inappropriate physical discipline. The court allowed her supervised visitation. In March, Nyamal dropped out of high school. At a May hearing, she stated that she dropped out because she was stressed about losing her children and could not reach the caseworker. Before February, she was on track to graduate from high school in December 2012. In May, she began GED classes at a program offered by a youth services center. She had missed some visits with her children because of delays in obtaining someone to transport the children and supervise the visits or because of scheduling conflicts. The May review hearing was continued until July 31.

In mid-July 2012, Nyamal obtained a temporary full-time job that paid her \$9.37 per hour and required her to work from 2 to 11:15 p.m. She informed her caseworker of her employment and asked for a change in her visitation times. She was inconsistent in her visits because of her work hours. She attended only one GED class in July and did not report her discontinuation to the caseworker. In July, an instructor with the GED program wrote the guardian ad litem that Nyamal had a long way to go to obtain a GED diploma because she had below-average reading, writing, and mathematics skills. In the guardian ad litem's July report, she recommended that the court require Nyamal to complete her education by obtaining a high school diploma or a diploma through the GED program. But in May, neither the caseworker nor the guardian ad litem made these recommendations in their reports, even though Nyamal had dropped out of high school in March.

At the July 2012 continued hearing, Nyamal stated that the company she worked for often hired on a temporary basis until the temporary employee demonstrated that he or she would show up to work every day for several months. Nyamal stated that she had wanted to get her GED diploma, but that she did not have time to do so while she was working

full time and that she was worried about getting her children back and providing for their needs. She stated that she could get her GED diploma later and that she would consider it in another month or two. Because both her daughters were starting school, Nyamal did not believe it was a good time for her to attend classes. The court asked her whether she recognized that it would be easier for her to attend GED classes while she did not have custody of her children and that it would be very difficult to accomplish that goal if she had custody. The court also asked the caseworker whether it had previously ordered Nyamal to further her education or obtain a GED diploma:

[Court:] And I'm not sure that — do you know whether that's been ordered in this case? I mean she's ordered to further her education, obtain her G.E.D. [diploma]?

[Caseworker:] I don't recall.

Q Well let me ask — let me ask a different way. Do you believe that it's important for [Nyamal] in order to reunify herself with her children, that she get the G.E.D. [diploma] or a high school equivalency diploma?

A I think if [Nyamal] chooses to get her G.E.D. [diploma], that would only benefit her in looking for employment. When she is able to have her girls returned to her care.

After closing arguments, the court stated the following from the bench:

And I am gonna also order that [Nyamal] is to actively pursue either a G.E.D. [diploma] or a high school diploma. I do think it's highly relevant to the ability to provide for these children. The goal here in this case is reunification and you know, [Nyamal] does have a job which is good and maybe this will work out to be the one and only place that [Nyamal] will work. Maybe she'll work her way up from a temporary employee to a full-time and permanent employee and move and be able to stay with the company her whole life. But if not, then it's certainly important that she has some kind of a fall back plan and without a G.E.D. [diploma] or a high school diploma, even with those, employment is very difficult. But without them,

it's even more so and in the end that would make it more difficult for the — for the girls. So at this point and [sic] time, I am going to approve the recommendations with that change.

In its order, the court required Nyamal to “actively pursue a GED [diploma] or a high school diploma.” It also required both Nyamal and the biological father to “provide a legal means of financial support for the minor children” and continued the requirement that the department assist Nyamal to obtain her immigration documentation.

#### COURT OF APPEALS’ DECISION

On appeal, Nyamal assigned that the juvenile court erred in its review hearing order, filed August 9, 2012, by requiring her to actively pursue a high school diploma or a GED diploma. She argued that the requirement was not reasonably related to correcting the conditions that caused the adjudication.

The State contended only that the August 2012 order did not affect a substantial right because it merely continued the court’s previous orders. The Court of Appeals agreed. It stated that before she turned 19, Nyamal could have argued that requiring her to continue her high school education was unreasonable and had no connection to the goal of reunifying her with her children. Because she did not appeal from the orders and make those arguments, the Court of Appeals concluded that she had not presented a reason to “carve out an exception . . . to the rule prohibiting appeals from orders *which are a continuation of previous determinations of the court*”<sup>3</sup>:

Although Nyamal’s circumstances have arguably changed since the original dispositional order, the education provisions have continued and we find no justification or authority for creating an exception to the jurisdictional prohibition.

Additionally, while the subsequent orders changed the location or method of obtaining such education, the orders are essentially the same; that is to say, Nyamal was

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<sup>3</sup> *Id.* at 920-21, 835 N.W.2d at 94 (emphasis supplied).

required to work toward the equivalent of a high school education. . . . We conclude that the August 9, 2012, order is merely a continuation of the original December 10, 2010, dispositional order. Therefore, any appeal to the court's education requirement should have been made within the applicable period after the December 10 order. The current appeal is an impermissible collateral attack on a prior judgment.<sup>4</sup>

### ASSIGNMENT OF ERROR

Nyamal assigns that the Court of Appeals erred in dismissing her appeal for lack of jurisdiction.

### STANDARD OF REVIEW

[1,2] We independently review questions of law decided by a lower court.<sup>5</sup> A jurisdictional issue that does not involve a factual dispute presents a question of law.<sup>6</sup>

### ANALYSIS

Nyamal contends that the Court of Appeals' jurisdictional analysis was incorrect because the August 2012 order did not merely change the location or method of obtaining an education. She argues that the disposition and early review orders, which required her only to continue with her education, are not the same as the August 2012 order, which demands that she pursue a high school diploma or a GED diploma. She contends that these orders did not impose equivalent requirements. And she argues that the Court of Appeals' reasoning will invite abuse by juvenile courts because it permits them to impose significant new requirements in a rehabilitation plan if the permanency goal is the same. And she argues that the Court of Appeals erroneously downplayed the significance of her aging out of the juvenile system as an intervening circumstance that broke the chain of continuity in these orders.

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<sup>4</sup> *Id.* at 921, 835 N.W.2d at 94-95.

<sup>5</sup> See *Guinn v. Murray*, *ante* p. 584, 837 N.W.2d 805 (2013).

<sup>6</sup> *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

The State argues that the juvenile court's earlier orders, which required Nyamal to continue her high school education, were equivalent to its August 2012 order that she pursue a high school diploma or a GED diploma.

[3-6] Juvenile court proceedings are special proceedings under Neb. Rev. Stat. § 25-1902 (Reissue 2008), and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child.<sup>7</sup> Under Neb. Rev. Stat. § 43-288 (Reissue 2008), a juvenile court has discretion to require a parent, among other things, to comply with a rehabilitation plan that will correct the conditions that led to the adjudication and to adequately provide for his or her child's needs.<sup>8</sup> A juvenile court order imposing a rehabilitation plan affects a parent's substantial right in a special proceeding and is appealable.<sup>9</sup> But a juvenile court order that merely extends the time that the requirements of a previous order are in effect does not affect a substantial right or extend the time in which a party may appeal the original order.<sup>10</sup>

We have held that a review order does not affect a parent's substantial right if the court adopts a case plan or permanency plan that is almost identical to the plan that the court adopted in a previous disposition or review order.<sup>11</sup> Conversely, the Court of Appeals has held that a juvenile court's order following a review or permanency plan hearing affects a parent's substantial right when it adopts a case plan that (1) reduces or eliminates visitation for a significant period<sup>12</sup> or (2) changes the permanency objective to guardianship and adoption with

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<sup>7</sup> See, *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

<sup>8</sup> See *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013).

<sup>9</sup> *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003).

<sup>10</sup> See *In re Guardianship of Rebecca B. et al.*, *supra* note 1.

<sup>11</sup> See, *id.*; *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

<sup>12</sup> See, *In re Interest of A.W. et al.*, 16 Neb. App. 210, 742 N.W.2d 250 (2007), citing *In re Interest of B.J.M. et al.*, 1 Neb. App. 851, 510 N.W.2d 418 (1993).

the State providing no further services for family reunification or preservation.<sup>13</sup>

Here, the August 2012 order did not change visitation rights or the permanency goal. But we disagree with the Court of Appeals that the case plan adopted in the juvenile court's August order was equivalent to the court's earlier case plans. The juvenile court explicitly stated from the bench that it was adopting the department's recommendations *with the change* in the rehabilitation plan. And that change was not insignificant.

While Nyamal was a minor ward in high school herself, the court's requirement that she continue her high school education did not require her to obtain a diploma as a condition of reunification with her children. In contrast, under the court's August 2012 order, Nyamal must actively pursue a high school diploma or a GED diploma or she will be out of compliance with the rehabilitation plan. So contrary to the Court of Appeals' reasoning, even if she had appealed from the original order, an appellate court would not have considered whether she was required to obtain a high school diploma or its equivalent.

Moreover, before August 2012, the court had consistently required Nyamal to seek part-time employment. But in the August 2012 order, it required her to "provide a *legal means* of financial support for the minor children." (Emphasis supplied.) The new order essentially meant that Nyamal's employment did not comply with her rehabilitation plan because she had not yet obtained authorization to legally work in the United States.

This change was consistent with the court's statement at trial that her education was more important than her job and shows that the change in the education requirement was not the same as its previous requirement. In the August 2012 order, the court clearly intended that Nyamal obtain a high school diploma or a GED diploma as a condition of reunification and that she not work because working was interfering with that goal.

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<sup>13</sup> See *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013).

The State conceded at oral argument that the August 2012 order effectively required Nyamal to obtain a high school diploma or a GED diploma. And a significant difference exists between requiring a minor ward to continue in school and requiring an adult with below-average academic skills to obtain a diploma or its equivalent as a condition of reunification. If Nyamal could not timely comply with this requirement, her children could potentially be in an out-of-home placement long enough to trigger a termination proceeding.<sup>14</sup> We conclude that the new requirement was a material change in the rehabilitation plan.

[7] Courts give substantial constitutional protection to a parent's right to care for and maintain custody of his or her child.<sup>15</sup> And an order that adopts a case plan with a material change in the conditions for reunification with a parent's child is a crucial step in proceedings that could possibly lead to the termination of parental rights. We therefore hold that such orders affect a parent's substantial right in a special proceeding and are appealable.

### CONCLUSION

We conclude that the Court of Appeals erred in holding that the juvenile court's order did not affect Nyamal's substantial right to raise her children. Because the juvenile court's order imposed a new requirement that she obtain a high school diploma or a GED diploma as a condition of reunification with her children, it did not merely continue the terms for reunification under its previous orders. We therefore reverse the Court of Appeals' judgment and remand the cause with directions for the court to consider the merits of Nyamal's appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

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<sup>14</sup> See Neb. Rev. Stat. § 43-292(7) (Cum. Supp. 2012).

<sup>15</sup> See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

IN RE PETITION FOR A RULE CHANGE TO CREATE A VOLUNTARY  
STATE BAR OF NEBRASKA: TO ABOLISH NEB. CT. R. CHAPTER 3,  
ARTICLE 8, AND TO MAKE WHATEVER OTHER RULE CHANGES  
ARE NECESSARY TO TRANSITION FROM A MANDATORY  
TO A VOLUNTARY STATE BAR ASSOCIATION.

841 N.W.2d 167

Filed December 6, 2013. No. S-36-120001.

1. **Constitutional Law: Attorneys at Law.** A state may constitutionally require a lawyer to be a member of a mandatory or unified bar to which compulsory dues are paid.
2. **Attorneys at Law.** The compelled association of an integrated bar is justified by the state's interest in regulating the legal profession and improving the quality of legal services.
3. **Constitutional Law: Attorneys at Law.** A state may constitutionally fund germane activities out of the mandatory dues of all members.
4. \_\_\_\_: \_\_\_\_\_. The Nebraska Constitution does not expressly vest the power to define and regulate the practice of law in any of the three branches of government.
5. **Constitutional Law.** In the absence of an express grant of power to any of the three branches of government, the power must be exercised by the branch to which it naturally belongs.
6. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court has the inherent power to promulgate rules providing for an integrated bar.
7. **Constitutional Law: Attorneys at Law.** The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.
8. **Constitutional Law.** Compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a mandated association among those who are required to pay the subsidy. Second, compulsory fees can be levied only insofar as they are a necessary incident of the larger regulatory purpose which justified the required association.

Petition to create voluntary state bar association. Petition granted in part, and in part denied.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LEMAN, and CASSEL, JJ.

PER CURIAM.

## INTRODUCTION

Scott Lautenbaugh, a Nebraska attorney (petitioner), filed a petition with this court, asking that we abolish, strike, or repeal

chapter 3, article 8, of the Nebraska Supreme Court Rules, and make whatever other rule changes are necessary to remove any requirement that attorneys licensed in Nebraska be members of the Nebraska State Bar Association (Bar Association). We invited public comment on the petition and, on September 30, 2013, heard oral presentations on behalf of petitioner and the Bar Association.

We deny the petition to create a purely voluntary bar, but we determine that the rules creating and establishing the Bar Association should be amended in the light of developments in compelled-speech jurisprudence from the U.S. Supreme Court since integration of the Bar Association in 1937. In the sections that follow, we (1) recognize the continuing constitutional legitimacy of mandatory or unified state bar associations, (2) recall the constitutional basis for and reasons justifying integration of the bar in 1937, (3) summarize the experience in other jurisdictions, (4) examine the evolution of compelled-speech jurisprudence, and (5) focus on the relevance of “germaneness.” Finally, we adopt the administrative changes we deem necessary to serve the important purposes of an integrated bar while both (1) ensuring that the Bar Association remains clearly within the permitted scope of constitutional jurisprudence and (2) avoiding the protracted litigation experienced elsewhere.

### MANDATORY STATE BAR ASSOCIATIONS

[1] Petitioner does not challenge the constitutionality of mandatory state bar associations. Analogizing state bar associations to “union-shop” arrangements, the U.S. Supreme Court established long ago that a state may constitutionally require a lawyer to be a member of a mandatory or unified bar to which compulsory dues are paid.<sup>1</sup>

[2,3] The core of petitioner’s grievance in this matter arises out of the 1990 holding of the Supreme Court in

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<sup>1</sup> *Lathrop v. Donohue*, 367 U.S. 820, 842, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961).

*Keller v. State Bar of California*,<sup>2</sup> where it took up the question of “permissible expenditures” of mandatory bar dues. Relying on *Abood v. Detroit Board of Education*,<sup>3</sup> a governmental employee union case, the Court delineated the First Amendment boundaries of a bar association’s expenditures of compulsory dues.

*Abood* held that a union could not expend a dissenting individual’s dues for ideological activities not “germane” to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.<sup>4</sup>

Thus, the Court held, “the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’”<sup>5</sup>

It is that “difficult question” of the use of mandatory bar dues for “germane” versus “nongermane” activities which, as in some other states, forms the basis for the challenge to Nebraska’s mandatory bar which is before us today.

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<sup>2</sup> *Keller v. State Bar of California*, 496 U.S. 1, 14, 110 S. Ct. 2228, 110 L. Ed. 2d 1 (1990).

<sup>3</sup> *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

<sup>4</sup> *Keller v. State Bar of California*, *supra* note 2, 496 U.S. at 13-14.

<sup>5</sup> *Id.*, 496 U.S. at 14.

INTEGRATION OF BAR  
ASSOCIATION

In 1937, this court granted a petition to integrate the bar of the State of Nebraska.<sup>6</sup> At that time, the petitioners felt that the majority of the members of the bar favored integration by Supreme Court rule to provide better service to the public by the legal profession, to combat the unauthorized practice of law, and to improve the ethical standards of the profession.<sup>7</sup> In general, the 1937 petition sought rules of this court providing for the regulation of the bar of this state.

[4-7] In that proceeding, this court for the first time pondered its power to integrate the bar by rule of the court, noting that the Nebraska Constitution did not expressly vest the power to define and regulate the practice of law in any of the three branches of government. We reasoned that in the absence of an express grant of power to any of the branches, the power must be exercised by the branch to which it naturally belonged. In concluding that this court had the inherent power to promulgate rules providing for an integrated bar, we explained that we had the exclusive power to regulate the conduct and qualifications of attorneys as officers of the court, that the proper administration of justice was the main business of a court, and that “[t]he practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.”<sup>8</sup> Because the bench and bar were so intimately related, we concluded that the problems of one were the problems of the other.

In our 1937 opinion, this court set forth the initial rules creating, controlling, and regulating the Bar Association. We formed the Bar Association “[f]or the advancement of the administration of justice according to law, and for the

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<sup>6</sup> See *In re Integration of Nebraska State Bar Ass’n*, 133 Neb. 283, 275 N.W. 265 (1937).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 289, 275 N.W. at 268.

advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar . . . .”<sup>9</sup> At that time, those persons who were residents of Nebraska licensed to practice law in the state constituted the membership of the Bar Association. All members were compelled to pay dues.

In that same opinion, we also observed that our inherent power to integrate the bar included the authority to rescind the rules providing for integration. We stated, “In the event of a failure of the plan to function as hoped, it can be corrected or abandoned by the amendment or revocation of the rule by the court in the exercise of its sound judicial discretion.”<sup>10</sup> This petition presents the first attempt before this court to eliminate the mandatory bar in Nebraska.

#### ACTIONS ELSEWHERE TO ELIMINATE MANDATORY BAR

Other jurisdictions have been confronted with actions to abolish the mandatory bar. Thirty-two states and the District of Columbia require attorneys to become members of a bar and to pay dues as a condition of practicing law in that jurisdiction.<sup>11</sup> Aside from the temporary suspension of mandatory bar membership by the Wisconsin Supreme Court from 1988 to 1992, discussed in more detail below, no state association has converted from mandatory to voluntary status.<sup>12</sup> We note that the mandatory status of the Puerto Rico Bar Association was eliminated in 2009 by an act of the legislature,<sup>13</sup> and the

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<sup>9</sup> *Id.* at 291, 275 N.W. at 269. See, also, Neb. Ct. R. § 3-802(A).

<sup>10</sup> *Id.* at 290, 275 N.W. at 269.

<sup>11</sup> Ralph H. Brock, “*An Aliquot Portion of Their Dues:*” *A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech J. Tex. Admin. L. 23 (2000); ABA Division for Bar Services, *2011 State and Local Bar Membership, Administration and Finance Survey* (2012).

<sup>12</sup> The Strategic Planning Committee of the State Bar of Wisconsin, *Future of the State Bar: Mandatory/ Voluntary Membership Report* (February 2010), <http://www.wicourts.gov/supreme/docs/1101petitionreport.pdf> (last visited Dec. 2, 2013).

<sup>13</sup> See 2009 P.R. Laws 121, § 2, and 2009 P.R. Laws 135, § 2.

law in Puerto Rico now provides for voluntary membership.<sup>14</sup> However, in September 2013, legislation was filed to return to mandatory bar membership.<sup>15</sup>

We briefly recount recent efforts in Wisconsin, New Mexico, and New Hampshire to eliminate the mandatory state bar.

#### WISCONSIN BAR ASSOCIATION

Integration of the bar in Wisconsin has been a contentious matter from the beginning. Upon the first motion seeking integration, the Supreme Court of Wisconsin postponed the matter to a time after the lawyers in military service returned home from World War II.<sup>16</sup> When the matter of integration next came before the Supreme Court of Wisconsin, the court concluded that a voluntary bar was preferable and that the bar should not be integrated.<sup>17</sup> But upon the third motion for integration, the Supreme Court of Wisconsin determined that the bar should be integrated when proper rules and procedures had been adopted by further order of the court.<sup>18</sup> Thus, the Wisconsin bar became an integrated bar on January 1, 1957, under rules and bylaws promulgated by the court.<sup>19</sup> The U.S. Supreme Court later upheld a constitutional challenge to integration of the bar's membership.<sup>20</sup>

The Supreme Court of Wisconsin had further opportunities to consider whether the bar should remain integrated. In 1977<sup>21</sup> and again in 1980,<sup>22</sup> the court approved continuation of the integrated bar.

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<sup>14</sup> P.R. Laws Ann. tit. 4, § 774 (2013).

<sup>15</sup> See P.R. S.B. PS 729 (Sept. 6, 2013).

<sup>16</sup> See *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943).

<sup>17</sup> See *In re Integration of Bar*, 249 Wis. 523, 25 N.W.2d 500 (1946), *overruled in part*, *In re Integration of Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (1958).

<sup>18</sup> See *In re Integration of Bar*, 273 Wis. 281, 77 N.W.2d 602 (1956).

<sup>19</sup> See *Lathrop v. Donohue*, *supra* note 1.

<sup>20</sup> See *id.*

<sup>21</sup> See *In re Regulation of the Bar of Wisconsin*, 81 Wis. 2d xxxv (1977).

<sup>22</sup> *Matter of Discontinuation of Wis. State Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980).

A challenge to the constitutionality of the integrated bar led to a temporary suspension of mandatory membership. In *Levine v. Supreme Court of Wisconsin*,<sup>23</sup> a federal district court found that the mandatory membership requirement violated the litigant's First Amendment rights of free speech and free association and was not justified by a compelling state interest. As a result, the Supreme Court of Wisconsin suspended enforcement of its mandatory bar membership rules.<sup>24</sup> On appeal, the Seventh Circuit reversed, concluding that *Lathrop v. Donohue*<sup>25</sup>—which upheld the constitutionality of integration—was binding precedent.<sup>26</sup> The Supreme Court of Wisconsin reinstated the integrated bar effective July 1, 1992.<sup>27</sup>

The bar in Wisconsin remains mandatory amid unrest. A member satisfaction survey conducted for the bar in 2008 revealed that a majority of the respondents—57 percent—would vote for a voluntary association if given the opportunity to do so.<sup>28</sup> In July 2011, two attorneys filed a petition renewing their request that the Supreme Court of Wisconsin abolish the integrated bar.<sup>29</sup> The court, with three justices dissenting, denied the petition without a public hearing.<sup>30</sup>

#### STATE BAR OF NEW MEXICO

In 2003, two petitioners sought to modify a New Mexico Supreme Court rule<sup>31</sup> to change the bar from a mandatory bar to a voluntary bar. In response to the petition, the Board of

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<sup>23</sup> *Levine v. Supreme Court of Wisconsin*, 679 F. Supp. 1478 (W.D. Wis. 1988).

<sup>24</sup> *In Matter of State Bar of Wisconsin*, 169 Wis. 2d 21, 485 N.W.2d 225 (1992).

<sup>25</sup> *Lathrop v. Donohue*, *supra* note 1.

<sup>26</sup> *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988).

<sup>27</sup> *In Matter of State Bar of Wisconsin*, *supra* note 24.

<sup>28</sup> The Strategic Planning Committee of the State Bar of Wisconsin, *supra* note 12.

<sup>29</sup> Wis. S. Ct. Order 11-04 (June 6, 2012).

<sup>30</sup> *Id.*

<sup>31</sup> Rule 24-101 NMRA.

Bar Commissioners of the State Bar of New Mexico identified policy supporting a mandatory bar, such as a mandatory bar's being more able to promote justice and the legal system's ability to make justice obtainable. The board also identified policies supporting a voluntary bar, including the freedom of association and a voluntary bar's freedom and independence from the court. The New Mexico Supreme Court denied the petition without a public hearing.

#### NEW HAMPSHIRE BAR ASSOCIATION

In New Hampshire, the bar was first unified in 1968 for a trial period of 3 years.<sup>32</sup> The Supreme Court of New Hampshire reasoned that mandatory membership was “an integral part of the inherent power of this court to regulate the practice of law and to supervise” those engaging in the practice.<sup>33</sup> In 1972, the court reexamined unification, concluded that the New Hampshire Bar Association had benefited from the trial experience, and ordered the bar unified on a permanent basis.<sup>34</sup>

During the 2003 legislative session, the New Hampshire General Court enacted legislation which purported to require the bar association to place on the ballot with the election of the association's officers the question of whether membership in the bar association should be required.<sup>35</sup> The bar association brought an original action challenging the constitutionality of the legislative act, and the Supreme Court of New Hampshire declared the statute to be unconstitutional.<sup>36</sup> The court reasoned that “because we have elected to regulate the practice of law through unification, [the statute at issue], which permits de-unification without our involvement and contrary to our

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<sup>32</sup> *In re Unification of the New Hampshire Bar*, 109 N.H. 260, 248 A.2d 709 (1968).

<sup>33</sup> *Id.* at 264, 248 A.2d at 712.

<sup>34</sup> *In re Unified New Hampshire Bar*, 112 N.H. 204, 291 A.2d 600 (1972).

<sup>35</sup> See *In re Petition of New Hampshire Bar Ass'n*, 151 N.H. 112, 855 A.2d 450 (2004).

<sup>36</sup> *Id.*

specific order, encroaches upon inherent judicial authority.”<sup>37</sup> The bar remains unified.<sup>38</sup>

### FIRST AMENDMENT COMPELLED-SPEECH JURISPRUDENCE

Mandatory bars present issues under the First Amendment to the U.S. Constitution because members are required to join the group—and pay dues—in order to practice law. “These requirements implicate the First Amendment freedom of association, which includes the freedom to choose not to associate, and the First Amendment freedom of speech, which also includes the freedom to remain silent or to avoid subsidizing group speech with which a person disagrees.”<sup>39</sup>

Since the integration and creation of our Bar Association in 1937, the legal landscape concerning compelled speech has evolved. As discussed below, the U.S. Supreme Court has determined that some mandatory associations, such as some unions and state bar associations, do not violate the First Amendment, because the forced speech serves legitimate purposes for the benefit of its entire membership. The critical inquiry in forced speech cases is whether the speech or activity being “forced” on the dissenting member is “germane” to the “group’s constitutionally permissible purposes.”<sup>40</sup> In *Lathrop*,<sup>41</sup> a Wisconsin attorney argued that his compelled membership in the state bar violated his rights under the 14th Amendment to the U.S. Constitution because the bar engaged in political activities which he opposed. The U.S. Supreme Court reasoned that the bulk of the bar’s activities served the function of elevating the educational and ethical standards of the bar in order to improve the quality of legal services available to the citizens of the state. The Court stated:

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<sup>37</sup> *Id.*, 151 N.H. at 119, 855 A.2d at 456.

<sup>38</sup> ABA Division for Bar Services, *supra* note 11.

<sup>39</sup> *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 712-13 (7th Cir. 2010).

<sup>40</sup> 1 Rodney A. Smolla, Smolla and Nimmer on Freedom of Speech § 4:26 (2013), available at Westlaw FREESPEECH.

<sup>41</sup> *Lathrop v. Donohue*, *supra* note 1.

We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.<sup>42</sup>

The Court found no violation of the 14th Amendment by the requirement that lawyers practicing in the state become members of the state bar and pay reasonable annual dues, but the Court reserved judgment on the attorney's claim that his free speech rights were violated by the bar's use of his mandatory dues to support political activities.

In *Abood v. Detroit Board of Education*,<sup>43</sup> every local governmental employee represented by a union, even though not a union member, was required to pay to the union, as a condition of employment, a service fee equal in amount to union dues. The U.S. Supreme Court considered whether that arrangement violated the constitutional rights of employees who object to public-sector unions or to various union activities financed by the compulsory service fees. The Court reasoned:

We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.<sup>44</sup>

Thus, the Court held that the agency-shop clause was valid insofar as the service fees were used to finance expenditures

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<sup>42</sup> *Id.*, 367 U.S. at 843.

<sup>43</sup> *Abood v. Detroit Board of Education*, *supra* note 3.

<sup>44</sup> *Id.*, 431 U.S. at 235-36.

by the union for purposes of collective bargaining, contract administration, and grievance adjustment.

In *Teachers v. Hudson*,<sup>45</sup> employees who did not belong to a union challenged the procedure used to determine the proportionate share that they were required to contribute to support the union as a collective bargaining agent, alleging that it violated their 1st and 14th Amendment rights and permitted the use of their proportionate shares for impermissible purposes. The U.S. Supreme Court held that “the constitutional requirements for the Union’s collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.”<sup>46</sup>

As noted at the outset of our opinion, it is the seminal and oft-cited case of *Keller v. State Bar of California*<sup>47</sup> which is the foundation of this petition and, indeed, most claims challenging mandatory state bar associations. In *Keller*, members of the State Bar of California sued the bar, alleging that it violated their rights under the First Amendment by using their membership dues to finance certain ideological or political activities to which they were opposed. The Supreme Court observed that the relationship of a state bar and its members was analogous to the relationship of employee unions and their members and that agency-shop laws were enacted to prevent those who receive the benefit of union negotiation but who do not join the union and pay dues from avoiding paying their fair share of the cost of a process from which they benefit.

Furthermore, the Court stated that it was appropriate that all of the lawyers who derive benefits from being admitted

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<sup>45</sup> *Teachers v. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986).

<sup>46</sup> *Id.*, 475 U.S. at 310.

<sup>47</sup> *Keller v. State Bar of California*, *supra* note 2.

to practice law “should be called upon to pay a fair share of the cost of the professional involvement in this effort.”<sup>48</sup> The Supreme Court determined:

[T]he compelled association and integrated bar are justified by the State’s interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.<sup>49</sup>

In order to define activities not germane to the bar association’s goals, the guiding standard is “whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’”<sup>50</sup> The Court declared that “an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*.”<sup>51</sup>

*United States v. United Foods, Inc.*<sup>52</sup> teaches that the test to determine what group speech is constitutionally permissible is not whether the speech is political or ideological in nature, but, rather, whether the speech is germane. The Supreme Court iterated that “speech need not be characterized as political before it receives First Amendment protection”<sup>53</sup> and that “[l]awyers could be required to pay moneys in support of activities that were germane to the reason justifying the compelled association in the first place, for example,

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<sup>48</sup> *Id.*, 496 U.S. at 12.

<sup>49</sup> *Id.*, 496 U.S. at 13-14.

<sup>50</sup> *Id.*, 496 U.S. at 14.

<sup>51</sup> *Id.*, 496 U.S. at 17.

<sup>52</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001).

<sup>53</sup> *Id.*, 533 U.S. at 413.

expenditures . . . that related to ‘activities connected with disciplining members of the Bar or proposing ethical codes for the profession.’”<sup>54</sup>

The germaneness of an expenditure by a mandatory bar for a nonideological activity was considered in *Romero v. Colegio de Abogados de Puerto Rico*.<sup>55</sup> In that case, the mandatory bar in Puerto Rico required members to purchase life insurance from its group life insurance program. There was no provision which would allow a member to refuse the life insurance and retain the portion of the member’s dues that would otherwise have been spent on life insurance premiums. The First Circuit determined that the required payment for group life insurance was unconstitutional, because it was not germane to the bar association’s purpose of regulating the legal profession and improving the quality of legal services. As the First Circuit stated, “[T]hat an individual may be compelled to associate and financially contribute for some purposes does not mean she may be compelled to associate and financially contribute for all purposes.”<sup>56</sup>

Likewise, in *Kingstad v. State Bar of Wis.*,<sup>57</sup> three Wisconsin attorneys objected to the state bar’s use of a portion of their mandatory dues to fund a public image campaign. The Seventh Circuit held that in order to withstand scrutiny under the First Amendment, expenditures by the state bar which are funded by mandatory dues must be germane to legitimate purposes of the bar, regardless of the ideological and political nature of the activity. In other words, a bar member may not, under *Kingstad*, be compelled to subsidize “nongermane” activities of any type. The Seventh Circuit determined, however, that the disputed public image campaign—which had the goal of improving the public’s perception of Wisconsin lawyers—was germane to the legitimate purposes of the bar, because the

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<sup>54</sup> *Id.*, 533 U.S. at 414.

<sup>55</sup> *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000).

<sup>56</sup> *Id.* at 301.

<sup>57</sup> *Kingstad v. State Bar of Wis.*, *supra* note 39.

expenditure was reasonably related to the purpose of improving the quality of legal services.

Most recently, the legal landscape was again altered to some degree with *Knox v. Service Employees Intern. Union*,<sup>58</sup> wherein the U.S. Supreme Court considered whether a union could require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities without running afoul of the First Amendment. The Supreme Court recalled that it had held "[t]he First Amendment . . . does not permit a public-sector union to adopt procedures that have the effect of requiring objecting nonmembers to lend the union money to be used for political, ideological, and other purposes not germane to collective bargaining."<sup>59</sup>

The *Knox* Court cast doubt on the constitutional validity of opt-out systems for dissenting members. The Court stated, "By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate."<sup>60</sup> The *Knox* Court further stated, "Our cases have tolerated a substantial impingement on First Amendment rights by allowing unions to impose an opt-out requirement at all."<sup>61</sup> With regard to the collection of special assessment dues at issue in *Knox*, the Court determined that "the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out."<sup>62</sup> We note that the *Knox* Court did not strike down the use of an opt-out system altogether, but the concurrence points out that its continued viability is in doubt, stating that "while the majority's novel rule is, on its face, limited to

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<sup>58</sup> *Knox v. Service Employees Intern. Union*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

<sup>59</sup> *Id.*, 132 S. Ct. at 2284-85.

<sup>60</sup> *Id.*, 132 S. Ct. at 2291.

<sup>61</sup> *Id.*, 132 S. Ct. at 2293.

<sup>62</sup> *Id.*

special assessments and dues increases, the majority strongly hints that this line may not long endure.”<sup>63</sup>

#### RELEVANCE OF “GERMANENESS”

The proponents and opponents of the mandatory bar disagree on the relevance of germaneness under *Keller*<sup>64</sup> and *Kingstad*.<sup>65</sup> The Bar Association contends that *Keller* and its progeny require only that objecting members not be required to pay for nongermane political and ideological lobbying. Contrarily, an opponent of the mandatory bar argues that under *Kingstad*, it is no longer enough that an objecting member’s mandatory dues not be used for ideological and political activities by the Bar Association; rather, the mandatory dues must be used only for germane purposes, regardless of the nature of the activity.<sup>66</sup>

One commentator and supporter of the mandatory bar, who submitted comments on behalf of the Bar Association, concedes that *Kingstad* is a “partially contrary opinion” to the bar’s view that *Keller* focuses primarily on the political or ideological nature of the bar’s activities, not its germaneness.<sup>67</sup> In other words, the Bar Association believes that it can use mandatory dues to finance “nongermane” activities so long as the activities are not “political and ideological.”<sup>68</sup> It is urged that *Kingstad* is a misinterpretation of *Keller* and its progeny. That argument is premised on the view that the U.S. Supreme Court’s “characterization of *Keller*” in *United Foods, Inc.*,<sup>69</sup>

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<sup>63</sup> *Id.*, 132 S. Ct. at 2299 (Sotomayor, J., concurring in the judgment; Ginsburg, J., joins).

<sup>64</sup> *Keller v. State Bar of California*, *supra* note 2.

<sup>65</sup> *Kingstad v. State Bar of Wis.*, *supra* note 39.

<sup>66</sup> See comment letter from James C. Creigh to Clerk of the Nebraska Supreme Court and Court of Appeals (May 29, 2012) (on file in case No. S-36-120001).

<sup>67</sup> Letter from Prof. Michael Fenner, Creighton Univ. School of Law, to Jane Schoenike, Exec. Dir., Nebraska State Bar Assn. (Feb. 15, 2012) (on file in case No. S-36-120001).

<sup>68</sup> *Id.*

<sup>69</sup> *United States v. United Foods, Inc.*, *supra* note 52.

the principal foundation of the *Kingstad* holding, cannot be used to support a “limitation on non-ideological and non-political speech expenditures” of a bar association because it takes that characterization “out of context and tries to make it stand for too much.”<sup>70</sup>

[8] However, the *Kingstad* analysis and its reliance on *United Foods, Inc.* appear to be reinforced by the U.S. Supreme Court’s recent *Knox* opinion. The *Knox* Court explained its decision in *United Foods, Inc.* as follows:

We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a “mandated association” among those who are required to pay the subsidy. . . . Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when they serve a “compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.” . . . Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a “necessary incident” of the “larger regulatory purpose which justified the required association.”<sup>71</sup>

That second criterion set forth in *Knox* reinforces the *Kingstad* “germaneness” analysis and the significance of that factor in protecting “associational freedoms.” The two-part *Knox* test focuses directly on the *United Foods, Inc.* characterization of *Keller* despite the “mundane commercial nature of [the] speech.”<sup>72</sup>

Thus, there appears to be ample support for the view expressed in *Kingstad* that germaneness is central to a modern view of *Keller*.

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<sup>70</sup> Fenner, *supra* note 67.

<sup>71</sup> *Knox v. Service Employees Intern. Union*, *supra* note 58, 132 S. Ct. at 2289 (citations omitted).

<sup>72</sup> *Id.*

## ADMINISTRATIVE RESOLUTION

Having said all that, however, we need not today decide the precise boundaries of First Amendment compelled-speech jurisprudence in 2013. The nature of the proceeding before this court, i.e., a petition for a rule change under the court's inherent authority, does not require us to resolve a case or controversy between two parties as would a proceeding under this court's appellate or original action jurisdiction. The present petition requires this court to assess the future and the structure of the mandatory bar in Nebraska at an administrative level and determine, based on trends in the law since 1937, how to best meet the needs of the judicial system, Nebraska attorneys, and the citizens of this state.

As noted at the outset, there were several important reasons underlying our 1937 decision to integrate the bar in Nebraska.<sup>73</sup> Those reasons still exist and remain valid justifications for a mandatory bar to this day. This court recognized in 1937 that "a few unethical practitioners ha[d] degraded the public esteem of the bar as a whole."<sup>74</sup> Our decisions in disciplinary cases since 1937 demonstrate the continued necessity of regulating the bar and ensuring that ethical rules for lawyers are maintained and enforced. This court also observed in 1937 that informed public opinion

favor[ed] bar integration by supreme court rule as a means of providing better service to the public by the legal profession, of effectively combating the unauthorized practice of law, and of improving the ethical standards of the profession and giving to it the high public esteem that it should enjoy.<sup>75</sup>

The demand for additional legal services has grown exponentially since 1937. In this age of instantaneous communications reaching to virtually every household, the need to combat the unauthorized practice of law presents new challenges. And

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<sup>73</sup> *In re Integration of Nebraska State Bar Ass'n*, *supra* note 6.

<sup>74</sup> *Id.* at 290, 275 N.W. at 268.

<sup>75</sup> *Id.* at 284, 275 N.W. at 266.

justifying the public's favorable view of the practicing bar remains a vital reason for an integrated bar.

Furthermore, the laws enacted by our Legislature and constitutional provisions adopted by the citizens of this state indicate that the people of Nebraska have come to rely on the existence of the Bar Association and depend upon this court's oversight of that association and the practice of law.<sup>76</sup>

In our view, the best solution is to modify the court's rules creating and establishing the Bar Association (and other related rules) to limit the use of mandatory dues, or assessments, to the regulation of the legal profession. This purpose clearly includes the functions of (1) admitting qualified applicants to membership in the Bar Association, (2) maintaining the records of membership, (3) enforcing the ethical rules governing the Bar Association's members, (4) regulating the mandate of continuing legal education, (5) maintaining records of trust fund requirements for lawyers, and (6) pursuing those who engage in the unauthorized practice of law. The mandatory Supreme Court assessments supporting these functions will be paid to the Bar Association on behalf of the Nebraska Supreme Court in much the same way that the existing disciplinary assessment is administered. By limiting the use of mandatory assessments to the arena of regulation of the legal profession, we ensure that the Bar Association remains well within the limits of the compelled-speech jurisprudence of the U.S. Supreme Court and avoid embroiling this court and the legal profession in unending quarrels and litigation over the germaneness of an activity in whole or in part, the constitutional adequacy of a

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<sup>76</sup> See, Neb. Const. art. V, § 21(4) (members of "bar of the state" on judicial nominating commissions); Neb. Const. art. V, § 28 (membership of Commission on Judicial Qualifications); Neb. Rev. Stat. §§ 7-204 (Reissue 2012); 20-506 (Supp. 2013); 23-3407 (Reissue 2012); 24-229 (Cum. Supp. 2012); 24-715 (Reissue 2008); 24-806 (Reissue 2008); 24-809 (Reissue 2008); 24-1201 (Reissue 2008); 25-2905 (Reissue 2008); 29-3924 (Reissue 2008); 43-3318 (Reissue 2008); 43-3342.05 (Supp. 2013); 55-422 (Reissue 2010); 76-557 (Reissue 2009); 76-1003 (Reissue 2009); 76-2802 (Reissue 2009); 76-2805 (Reissue 2009); 83-4,124 (Supp. 2013); and 84-1503 (Supp. 2013).

particular opt-in or opt-out system, or the appropriateness of a given grievance procedure.

The remaining activities of the Bar Association will be financed solely by revenues other than mandatory assessments. Obviously, voluntary dues would be a significant portion of those revenues. Voluntary bar dues fall outside the realm of the compelled-speech jurisprudence. Many members of the Bar Association may well elect to pay the voluntary dues assessment—particularly if the Bar Association strictly adheres to the use of such funds for purposes clearly benefiting the bar as a whole and avoids entanglement in ideological or political issues or legislation. The Bar Association has, over the years, developed and administered many laudable and worthwhile programs which have served the legal profession well. The Volunteer Lawyers Project with its legal self-help desks, the Nebraska Lawyers Assistance Program, the Casemaker Digest, its continuing legal education programs, and the SCOPE mentoring program are but a few of the worthy services offered by the Bar Association. Such services and programs and others like them can continue to thrive with the aid of voluntary dues, grants, and gifts from those who choose to support the voluntary components of the Bar Association.

We disagree with the parade of horrors predicted by both petitioner and the Bar Association regarding such an arrangement. Petitioner cautioned during his oral presentation that such a bar would be “cumbersome” compared to a purely voluntary bar. But petitioner’s approach fails to preserve the regulatory structure erected beginning in 1937 and would abandon the public’s reliance upon the existence of a mandatory bar. And our prior segregation of a bar-disciplinary assessment clearly demonstrates that administrative issues can be managed easily. Thus, we conclude that petitioner’s fear is unfounded. The Bar Association, on the other hand, asserted that having to perform an item-by-item germaneness analysis would be “not workable” and “way too expensive.” But our approach entirely avoids any such difficulty. We recognize that we have intentionally chosen to draw the line in a manner that forgoes the opportunity to expend mandatory assessments for some

purposes that might well be adjudged as germane. By drawing the line for use of mandatory bar assessments well within the bounds of the compelled-speech jurisprudence, we ensure that the assessments—which will be administered by the Supreme Court—will be used only for activities that are clearly germane. Here again, our experience with the disciplinary assessment shows that this separation between mandatory and voluntary dues can be readily accomplished. And by drawing the line in this way, we will clearly avoid the morass of continuing litigation experienced in other jurisdictions.

### CONCLUSION

Although we reject petitioner's request for complete deunification of the Bar Association, we sustain the petition to the extent that we amend this court's rules to limit the use of mandatory bar dues, now to be referred to as "mandatory membership assessments," to the regulation of the legal profession. The Bar Association may collect voluntary dues to finance nonregulatory activities which may benefit the legal profession as a whole. We attach to this opinion the necessary rule changes in chapter 3, "Attorneys and the Practice of Law," of the Nebraska Supreme Court Rules, which include amendments to the following articles thereof:

- Article 1: Admission Requirements for the Practice of Law;
- Article 3: Discipline Procedures for Lawyers;
- Article 8: State Bar Association; Creation; Control; and Regulation;
- Article 9: Trust Fund Requirements for Lawyers; and
- Article 10: Unauthorized Practice of Law.
- Nebraska Commission on Unauthorized Practice of Law Administrative Rules, Regulations, and Procedures.

The amendments to articles 3 and 8, and the amendments to Neb. Ct. R. §§ 3-100 and 3-1010, shall be effective on January 1, 2014. In order to ensure an orderly transition of administrative functions regarding admissions, trust funds, and the unauthorized practice of law, all other amendments to the rules, regulations, and procedures identified above shall be effective on April 1, 2014.

And we reiterate that the need for further amendments may arise. We have already quoted the recognition in our 1937 opinion that correction or abandonment of a rule may be accomplished by amendment or revocation in the exercise of our sound judicial discretion.<sup>77</sup> While abandonment and revocation are unlikely, correction by amendment may be required as the implementation of these changes progresses.

We recognize that as of the date of issuance of this opinion, the billing statements for bar dues for 2014 have been distributed. Indeed, this court just recently approved the rates for bar dues and the disciplinary assessment required for 2014. Therefore, in order to effectuate the directive of this court based on this opinion and ensure an orderly transition in the structure of the financing of the Bar Association, we direct that the Bar Association conduct, as soon as practicable, a special mailing advising each of its members that (1) the member must pay mandatory membership assessments established by the Supreme Court in the amount appropriate to the member's class of membership as set forth below:

<b>Membership Class</b>	<b>§ 3-100(B) (Adm.)</b>	<b>§ 3-301(E) (Discipline)</b>	<b>§ 3-1010(B) (UPL)</b>	<b>Total</b>
Regular Active	\$25.00	\$60.00	\$13.00	\$98.00
Junior Active	\$25.00	\$60.00	\$13.00	\$98.00
Senior Active	\$25.00	\$60.00	\$13.00	\$98.00
Judicial Active	\$25.00	\$60.00	\$13.00	\$98.00
Military Active	0	0	0	0
Regular Inactive	\$12.50	\$30.00	\$ 6.50	\$49.00
Emeritus Inactive	0	0	0	0

(2) the member may elect to pay the voluntary dues component of the Bar Association by paying such voluntary dues in an amount to be established by the Bar Association for the 2014 calendar year, with credit for any amount previously paid in excess of the mandatory membership assessments; and (3) if the member elects not to pay the voluntary dues component, the member shall be entitled to a refund of any amounts

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<sup>77</sup> See *In re Integration of Nebraska State Bar Ass'n*, *supra* note 6.

previously paid by the member for the 2014 calendar year in excess of the mandatory membership assessments.

Thus, we grant the petition in part and, in part, deny the petition.

PETITION GRANTED IN PART, AND IN PART DENIED.

***ATTACHMENT TO CASE NO. S-36-120001***

**CHAPTER 3**

**ATTORNEYS AND THE PRACTICE OF LAW**

**ARTICLE 1**

**ADMISSION REQUIREMENTS FOR  
THE PRACTICE OF LAW**

**Preamble.**

. . . .

**§ 3-100. Supreme Court jurisdiction.**

(A) The Supreme Court exercises jurisdiction over all matters involving the licensing of persons to practice law in the State of Nebraska. Accordingly, the Supreme Court has adopted the following rules governing admission to the practice of law.

(B) Every attorney admitted to practice in the State of Nebraska shall pay a bar admissions assessment for each calendar year from January 1 to December 31, payable in advance on or before January 1 of each year, in such amount as may be fixed by the Court. The first bar admissions assessment shall be due on or before January 1, 2014. In accordance with Neb. Ct. R. § 3-803(D), such assessment shall be paid to the Treasurer of the Nebraska State Bar Association and shall be used to defray the costs of bar admissions administration and enforcement as established by these rules. Different classifications of bar admissions assessments may be established for Active Jr., Active Sr., Active, Inactive, Military, and Emeritus members as those membership classes are defined in Neb. Ct. R. § 3-803. Members newly admitted to the practice of law in

the State of Nebraska shall not pay a bar admissions assessment for the remainder of the calendar year in which they are admitted.

(C) Members who fail to pay the bar admissions assessment shall be subject to suspension from the practice of law as provided in Neb. Ct. R. § 3-803(E).

. . . .

**§ 3-103. Director of admissions.**

The Supreme Court's ~~shall appoint~~ a director of admissions (director), employed by the Court pursuant to Neb. Ct. R. § 3-803(A)(2), who shall serve under the supervision of the Court and perform such duties for the Commission as these rules may require. The director of admissions shall not be a member of the Commission, but shall, for purposes of these rules, act as the director of the Bar Commission.

. . . .

**§ 3-106. Communications in official confidence; immunity.**

The records, papers, applications, and other documents containing information collected and compiled by the Commission, its members, its the director, Commission employees, agents, or representatives are held in official confidence for all purposes other than cooperation with another bar licensing authority. Provided, however, that an applicant's appeal to the Supreme Court may result in such communications becoming public record. The Commission, its members, its the director, and all Commission employees, agents, or representatives are immune from all civil liability for damages for conduct and communications occurring in the performance of and within the scope of the Commission's duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted to the practice of law. Records, statements of opinion, and other information regarding an applicant communicated to the Commission by any person or entity, firm, governmental authority, or institution, are privileged, and civil suits for damages predicated thereon may not be instituted.

. . . .

**§ 3-115. Reasonable accommodation.**

. . . .

(E) **Forms.** All forms necessary to complete a request for special testing accommodations will be available at no charge from the ~~D~~director of the Nebraska State Bar Commission. The applicant may file any additional documentation in support of the request.

. . . .

APPENDIX C  
POLICY ON APPLICANTS WITH A DISABILITY

. . . .

IV. COMMISSION DECISIONS

A. Procedures for Review of Requests

. . . .

2. In reviewing a request, the commission will follow these procedures.

(a) The commission will make a determination, and the ~~sec-~~  
~~retary~~ director of the commission will send notification of the determination to the applicant, no fewer than 25 days before the examination.

. . . .

APPENDIX D  
NEBRASKA STATE BAR COMMISSION  
EMERGENCY PREPAREDNESS PLAN

. . . .

**Policies and Procedures to Be Followed in  
Case of Emergencies**

During the examination, the Site Supervisor and staff members will be wearing radios so they can be immediately contacted in the event of an emergency. The Site Supervisor must rapidly go to the site of any incident or emergency and quickly assess the situation. If the situation requires it, 911 should be called

immediately. The safety of the applicants, proctors, and staff is always of primary concern. The ~~Executive Director~~ director of admissions must be contacted promptly and given a report of the incident or emergency. If 911 is called, the Site Supervisor should immediately notify facility staff so that they can assist in meeting the emergency personnel and directing them to the appropriate location.

In any situation where a dispute arises, the Site Supervisor or staff member should attempt to calm the applicant and inform the applicant that the matter is being reported to the ~~Executive Director~~ director of admissions so that a decision can be made on how to proceed. As with any incident, the “Emergency Report” form (Form A) should be completed by the Site Supervisor as soon as possible.

. . . .

### **Delayed Starting Time**

While there may be very good reasons for delaying the examination, every attempt should be made to start the examination on time. If time permits, the Site Supervisor should contact the ~~Executive Director~~ director of admissions to report the delay and get instructions on when to begin the afternoon session. The ~~Executive Director~~ director of admissions will advise of the correct action to take, but in any event, the afternoon session should not begin less than 1 hour after the applicants have been dismissed from the morning session.

In the event of a natural disaster, the ~~Executive Director~~ director of admissions should be contacted prior to the start of the examination, as soon as the problem is identified. If the decision is made to give all applicants extra time, the Speaker will be directed to make such an announcement. If a decision is made to give individual applicants extra time, a board staff member will advise each affected applicant that he/she has been granted a certain amount of extra time. The applicant will be instructed to continue the examination after the other applicants have been dismissed. The applicant will be stopped individually when the extra time is up.

### **Extended Time**

Generally, extended time to complete an examination session by the amount of time lost due to a personal incident is not given.

If it is determined that a Major Disruption has occurred or that a small number of applicants have been negatively affected by a circumstance beyond their control and that it is possible to maintain the integrity of the testing environment, then the examination can be stopped for up to 1½ hours if the test site can accommodate the extended time. The Speaker should begin to read the disruption text that is attached as Appendix A to this Emergency Preparedness Plan. This should only be read after receiving instructions from the ~~Executive Director~~ director of admissions to do so.

. . . .

### **Restart or Dismiss**

After a determination to stop an examination has been made, the ~~Executive Director~~ director of admissions needs to determine whether to restart the examination or dismiss the examinees for the session. An examination can be restarted after the following criteria have been considered:

. . . .

### **Disputed Time Announcements**

The Site Supervisor is responsible for the accuracy of time announcements. The Site Supervisor will stand at the podium to ensure the announcements are the correct time and given at the appropriate time. If an applicant disputes a time announcement, the Site Supervisor should be contacted immediately. The Site Supervisor should report any such dispute to the ~~Executive Director~~ director of admissions and complete a “Record of Irregularity” form (Form B).

### **Flooding, Etc., at Facility**

As soon as such an incident is determined, the Site Supervisor must contact the ~~Executive Director~~ director of admissions immediately. Several proctors should be assigned to the

entrances of the examination room to advise the applicants that the situation is being assessed and further information will be provided as soon as it becomes available. Facility staff should be contacted immediately to determine what can be done to rectify the situation and make whatever arrangements are necessary to start the examination on time or as close to on time as possible.

### **Fire Drills**

The Site Supervisor should immediately determine if the fire alarm is a drill or an actual alarm. If it is a drill, the Site Supervisor should immediately contact facility staff and have the alarm shut off. The ~~Executive Director~~ director of admissions should then be contacted to determine if the disruption was significant enough to warrant the granting of additional testing time. If the alarm is valid, the procedures for the evacuation of the facility, stated below, should be followed.

### **Evacuation of Facility**

Before the examination, you should review the set-up diagram of the facility to familiarize yourself with the location of all exits. If time permits, the ~~Executive Director~~ director of admissions should be contacted immediately and evacuation procedures should be followed. The examination must be stopped and the time noted. The proctors should begin to move the applicants out of the building. The applicants may resist all efforts to be “herded.” However, sufficient presence should be displayed to avoid panic. A calm, solicitous approach, suggesting that the orderly and rapid exit and reassembly is to the applicant’s personal advantage is much more likely to result in a successful emergency exit than is an attitude on the part of the proctors which tends to demand military precision or gives the impression of such demands. If there is time, proctors should collect all examination materials. If there is a threat of fire, the last person out should close the doors. If there is a bomb threat, the doors should be left open.

. . . . .

### Noise From Another Group Using Facility

The Site Supervisor must go directly to the facility staff and demand that the noise be stopped. If the facility staff does comply with the demand, the ~~Executive Director~~ director of admissions should be contacted as soon as the problem has been resolved with the action that was taken. If the facility staff refused to comply with the demand, the Site Supervisor must contact the ~~Executive Director~~ director of admissions immediately.

When noise problems occur outside of the facility, the Site Supervisor must immediately go to the source of the noise and attempt to get the noise stopped. The Site Supervisor should then return to the room and make notes regarding the problem. An exact diagram of the room should be drawn so that the ~~Executive Director~~ director of admissions will know exactly which of the applicants were affected by the noise problem. Make sure proctors in the area write a detailed incident report on the "Record of Irregularity" form (Form B). If the Site Supervisor is unsuccessful in stopping the noise, the ~~Executive Director~~ director of admissions should be contacted to determine a course of action. Any of the Applicants who complain should be moved to another area if there is space available. It may be determined that the examination will be stopped until the noise ceases; however, the ~~Executive Director~~ director of admissions can only make that decision.

### Electrical Problems

. . . .

In the event of a power outage, the exact time of the outage and the length of time of the outage should be documented. The Site Supervisor should notify the ~~Executive Director~~ director of admissions immediately of any such outage. The applicants should be given additional time that is equal to the length of time of the outage.

Please note: The Site Supervisor should first check to see if the electrical problem may have been caused by plugs being kicked out of wall or floor outlets.

### **Applicants Leaving Examination Room**

Any applicant who leaves the examination room prior to completing the session should not be readmitted. If he/she objects, the ~~Executive Director~~ director of admissions should be contacted immediately to report the situation and ask for guidance.

. . . .

### **MBE Answer Sheet**

If an applicant marks circles (M/C) in their question book, contact the ~~Executive Director~~ director of admissions for guidance.

. . . .

### **People Wanting to Learn Whereabouts of Applicants**

All applicant information is confidential, and no staff member or proctor is to release any information regarding the whereabouts of an applicant. If the inquirer states that it is an emergency, the information should be taken and the ~~Executive Director~~ director of admissions must be contacted immediately for further guidance. No indication is to be given regarding whether or not an applicant is present. These instructions relate to the media and law enforcement personnel as well.

### **Possible Imposters**

In the possibility that an imposter is suspected of taking the examination for someone else, the incident must be well documented. The Site Supervisor and the Section Supervisor must provide a detailed description of the applicant; carefully observe the applicant involved and state, in detail, the reason for suspecting that the applicant is an imposter. Do not interrupt the applicant or otherwise disturb him/her. During the roll call portion of the examination, the Section Supervisor should pay extra attention that the photo identification provided is valid. The ~~Executive Director~~ director of admissions should be contacted immediately to report the suspected imposter. The Site Supervisor should clandestinely take the suspected imposter's photograph with the digital camera (at each test site).

. . . .

### **Complaints of Harassment by Proctors**

The Site Supervisor should go to the spot and observe the situation. After the session is complete, he/she should interview the complaining applicant. The Site Supervisor should not get involved with an argument or take either side. It is his/her primary responsibility to calm both parties and gather facts.

The Site Supervisor should advise the complaining applicant that the matter will be reported in detail to the ~~Executive Director~~ director of admissions and that if he/she wishes to file an additional statement, it should be forwarded to the ~~Executive Director~~ director of admissions. The Site Supervisor should offer to move the applicant to a vacant seat in another section. The Site Supervisor should get a detailed account of the incident from the proctor and submit it in conjunction with his/her report of the incident.

### **Unruly Applicants**

The Site Supervisor and security personnel should observe the applicant and immediately determine if the applicant should be moved to another area of the testing room, or escorted out of the testing room. The Site Supervisor should contact the ~~Executive Director~~ director of admissions prior to having the applicant leave the testing room.

. . . .

### **Typographical Errors**

If such an error is reported, the ~~Executive Director~~ director of admissions should be contacted immediately. Make no comment to any proctor or applicant regarding the error. Advise anyone inquiring about the error that the matter is being reported and that they should answer the question as stated. If the applicant feels there is an issue, the applicant should submit a detailed written description to the ~~Executive Director~~ director of admissions immediately after the bar examination has concluded.

### **Receipt of Threat to Safety**

Notice of the possibility of a condition that might require the emergency exit from an examination site can arrive from

a variety of sources. Possibly an applicant may return from lunch with a rumor of a planned disruption which he or she has overheard. A member of the facility staff may report some reference to an emergency. A bomb threat might be incoming on the telephone. Irrespective of the source and nature of the information received, the recipient should gain all possible information. The "Response to Personally Delivered Threat Information" form (Form D) should be made available in all sections. Upon rapid, thorough, and accurate completion of the form, it should be quickly hand-delivered to either the ~~Executive Director~~ director of admissions or Site Supervisor, whoever happens to be the most readily available.

In the event the threat is such that the site will probably be uninhabitable preventing reentry, a dismissal exit should occur, but must first be approved by the ~~Executive Director~~ director of admissions. The time remaining in the session would also be a consideration. If there is only the threat of unknown validity, the emergency should be thoroughly analyzed before the exit is ordered.

### **Death or Serious Injury Notification**

. . . .

The ~~Executive Director~~ director of admissions must be advised before any action is taken or the applicant is notified. The ~~Executive Director~~ director of admissions or, if delegated, the Site Supervisor will personally make the notification. . . .

### **Media Coverage (TV, Newspapers, Magazines, Etc.)**

If media personnel, such as reporters or camera men, are present at the bar examination site, the Site Supervisor or his/her designee must notify the ~~Executive Director~~ director of admissions as soon as possible. Only the Site Supervisor is authorized to speak to the media and then, can ONLY discuss topics regarding general bar examination information that could be found on the Board's Web site. It must be remembered that ALL applicant information, including their identity, is confidential. . . .

NEBRASKA STATE BAR COMMISSION  
EMERGENCY REPORT

Name of Emergency: \_\_\_\_\_

\_\_\_\_\_

Number of Applicants affected: \_\_\_\_\_

Location of Test Site: \_\_\_\_\_

Proximity of Emergency to Other Applicants: \_\_\_\_\_

Did Applicants leave their seats?: \_\_\_\_\_ If so, how  
many?: \_\_\_\_\_

Examination numbers of applicants who left their seat: \_\_\_\_\_

Did other Applicants assist?: \_\_\_\_\_

Examination numbers of applicants who assisted: \_\_\_\_\_

What time did it occur?: \_\_\_\_\_ How much  
time was left in the session?: \_\_\_\_\_

What portion of the examination was being administered (PT,  
Essay, MBE)?: \_\_\_\_\_

Was there excessive noise?: \_\_\_\_\_ If so, describe  
in detail: \_\_\_\_\_

Other relevant details?: \_\_\_\_\_

\_\_\_\_\_

Time ~~Executive Director~~ director of admissions was called: \_\_\_\_\_

Time ~~Executive Director~~ director of admissions returned call  
with instructions on how to proceed: \_\_\_\_\_

Decision was: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

FORM A  
(Emergency Preparedness Plan)

. . . . .

NEBRASKA BAR COMMISSION  
DISRUPTION TEXT

(To be used in instances where a disruption has occurred and stopping of the examination is required.)

Stop writing (typing) now. I repeat, stop writing (typing) now. Put your pencils (pens) down and do not make any further marks on your examination papers until you are told to begin writing (typing). Please do not converse with other applicants or leave your seat. A disruption has occurred at this examination site. It is the decision of the ~~Executive Director~~ director of admissions that this examination session be temporarily stopped until the disruption is dealt with. I repeat, it is the direction of the ~~Executive Director~~ director of admissions that this examination session be temporarily stopped until the disruption is dealt with.

(Describe the disruption if appropriate.)

Again, do not converse with other applicants or leave your seat. I will keep you updated regarding the situation as information is relayed to me.

(Keep repeating sequences advising them not to write (type), talk or leave their seats, if you are advised to evacuate the test site, refer to the exit text.)

(If you are advised to restart the examination.)

(Describe how the disruption has been dealt with.)

(Announce)

Due to the disruption, applicants at this test site will receive \_\_\_\_\_ of extra time to complete this session of the examination. You have exactly \_\_\_\_\_ minutes to finish this session of the examination after I tell you to begin.

BEGIN.

APPENDIX A  
(Emergency Preparedness Plan)

....

## APPENDIX E

## FEES

Examination Fee:	An application fee of \$490 payable by <b>bank cashier's check or money order</b> , payable to the <u>Director</u> <del>Secretary</del> , Nebraska State Bar Commission, must accompany your application. The Nebraska State Bar Commission <b>does not</b> accept cash, personal checks, or firm checks.
....	
Motion Fee:	The required \$925 for a Class I-A, Class I-B, and Class I-C applicant must be paid in <b>bank cashier's check or money order only</b> , made payable to the <u>Director</u> <del>Secretary</del> , Nebraska State Bar Commission. The Nebraska State Bar Commission <b>does not accept</b> cash, personal checks, or firm checks.

Late Application Fee: \$150 for applications received no more than 30 days past the filing deadline.

....

## CHAPTER 3

## ATTORNEYS AND THE PRACTICE OF LAW

## ARTICLE 3

## DISCIPLINE PROCEDURES FOR LAWYERS

## § 3-301. Jurisdiction.

....

(E) Every attorney admitted to practice in the State of Nebraska shall pay a disciplinary assessment for each calendar year from January 1 to December 31, payable in advance on or before January 1 of each year, in such amount as may be fixed by the Court. ~~The first disciplinary assessment shall~~

~~be due on or before January 1, 2001.~~ The disciplinary assessment shall be paid to the Treasurer of the Association and shall be used to defray the costs of disciplinary administration and enforcement as established by these rules. Different classifications of disciplinary assessments may be established for Active Jr., Active Sr., Active, Inactive, Military, and Emeritus members as those membership classes are defined in Neb. Ct. R. § 3-803. Members newly admitted to the practice of law in the State of Nebraska shall not pay a disciplinary assessment for the remainder of the calendar year in which they are admitted.

. . . .

**§ 3-310. Procedure: Nebraska Supreme Court.**

. . . .

(N) The Court may disbar, suspend, censure, or reprimand the Respondent, place him or her on probation, or take such other action as shall by the Court be deemed appropriate. All orders of public discipline shall be forwarded by the Clerk to the Supreme Court's Director of Admissions ~~membership secretary of the Nebraska State Bar Association.~~

. . . .

**§ 3-311. Disability inactive status:  
Incompetency or incapacity.**

. . . .

(D) If, upon due consideration of the matter, the Court concludes the member is incapacitated from continuing to practice law, it shall enter an order placing the member on disability inactive status on the grounds of such disability until further order of the Court, and any pending disciplinary proceeding against the member shall be held in abeyance. Members on disability inactive status shall not be required to pay ~~annual dues or disciplinary~~ mandatory membership assessments to the ~~Nebraska State Bar Association~~ required by Neb. Ct. R. § 3-803(D).

. . . .

**CHAPTER 3**  
**ATTORNEYS AND THE PRACTICE OF LAW**  
**ARTICLE 8**  
**STATE BAR ASSOCIATION; CREATION;**  
**CONTROL; AND REGULATION**

. . . .

**§ 3-802. Purpose and authority.**

(A) Purpose. The purposes of this Association are to assist in the collection and distribution of Nebraska Supreme Court mandatory membership assessments used to pay all costs associated with the Court's regulation of the practice of law; improve the administration of justice; to foster and maintain high standards of conduct, integrity, confidence, and public service on the part of those engaged in the practice of law; to safeguard and promote the proper professional interests of the members of the Bar; to provide improvements in the education and qualifications required for admission to the Bar, the study of the science of jurisprudence and law reform, and the continuing legal education of the members of the Bar; to improve the relations of the Bar with the public; to carry on a continuing program of legal research; and to encourage cordial relations among the members of the Bar. All of these purposes are to the end that the public responsibilities of the legal profession may be more effectively discharged.

(B) Government. Subject to the inherent authority of the Nebraska Supreme Court, ~~The~~ the supreme authority of this Association shall be vested in the membership thereof through the exercise of the power of Initiative and Referendum in such manner as may be prescribed in the bylaws. Subject thereto, and except as otherwise provided by the rules of the Supreme Court, the control over the business and affairs of this Association shall be vested in a House of Delegates, as provided in § 3-805. Subject to the overall control of the House of Delegates, the Executive Council shall function as the administrative and executive organ of the Association as provided in § 3-806. The officers of the Association, as hereinafter

enumerated, shall have the prerogatives, responsibilities, and qualifications and shall perform the duties of the respective offices, all as provided in § 3-804.

### **§ 3-803. Membership.**

#### **(A) Requirements and Records of Membership.**

(1) All persons who, on the date that these rules go into effect, are admitted to the practice of law in this State, by order of the Nebraska Supreme Court, shall constitute the members of this Association, subject to due compliance with the requirements for membership hereinafter set forth, including payment of mandatory membership assessments as may be fixed by the Nebraska Supreme Court.

(2) The Director of Admissions, who shall be an employee of the Nebraska Supreme Court, shall maintain all records of membership of the Association and perform all other duties and responsibilities required by the Supreme Court and these rules.

(B) Classes. Members of this Association shall be divided into four classes, namely: Active members, Inactive members, Law Student members, and Emeritus members.

(1) All members who are licensed to engage in the active practice of law in the State of Nebraska, who do not qualify for and apply for Inactive membership status, and who are not Law Student members, shall be Active members.

(2) Any member who is not actively engaged in the practice of law in the State of Nebraska, or who is a nonresident of the State of Nebraska and not actively engaged in the practice of law in Nebraska, and who is not an Emeritus member, may, if he or she so elects, be placed in Inactive membership status.

A member desiring to be placed in Inactive membership status shall file written application therefor with the Secretary Director of Admissions and, if otherwise qualified, shall be placed in such inactive status classification. No Inactive members shall practice law in Nebraska, or vote or hold office in this Association. Any Inactive member may, on filing application

with the ~~Secretary~~ Director of Admissions and upon payment of the required dues, and compliance with such requirements as may be imposed by the Supreme Court to show fitness to engage in the active practice of law in this State, become an Active member.

(3) Any member who attained the age of 75 years of age during the dues year being billed or has been actively engaged in the practice of law in the State of Nebraska for 50 years or more during the dues year being billed may, if he or she so elects, be placed in an Emeritus membership status. A member desiring to be placed in an Emeritus membership status shall file written application therefor with the ~~Secretary~~ Director of Admissions and, if otherwise qualified, shall be placed in the Emeritus status classification. A member electing Emeritus classification shall not be required to pay membership dues to this Association. No Emeritus member shall practice law in Nebraska, or vote or hold office in this Association. Any Emeritus member may, on filing application with the ~~Secretary~~ Director of Admissions and upon payment of the required dues and compliance with the requirements as may be imposed by the Supreme Court to show fitness to engage in the active practice of law in this State, become an Active member.

. . . .

(6) In order to make information available to the public about the financial responsibility of each active member of this Association for professional liability claims, each such member shall, upon admission to the Bar, and ~~with~~ as part of each application for renewal thereof, submit the certification required by this rule. For purposes of this rule, professional liability insurance means:

. . . .

Each active member shall certify to ~~this Association~~ the Nebraska Supreme Court, through its Director of Admissions, on or before January 1 of each year: 1) whether or not such member is currently covered by professional liability insurance, other than an extended reporting endorsement;

2) whether or not such member is engaged in the private practice of law involving representation of clients drawn from the public; 3) whether or not such member is a partner, shareholder, or member in a domestic professional organization as defined by the rule governing Limited Liability Professional Organizations, and 4) whether or not the active member is exempt from the provisions of this rule because he or she is engaged in the practice of law as a full-time government attorney or in-house counsel and does not represent clients outside that capacity.

The foregoing shall be certified by each active member of this Association ~~in on~~ such form as may be prescribed by the Nebraska Supreme Court ~~this Association~~ which shall be included within the Association's annual mandatory assessment and voluntary dues statement. ~~and~~ Such certifications shall be made available to the public by such any means ~~as may be~~ designated by the ~~House of Delegates~~ Supreme Court. Failure to comply with this rule shall result in suspension from the active practice of law until such certification is received. An untruthful certification shall subject the member to appropriate disciplinary action. All members shall notify the Secretary Director of Admissions in writing within 30 days if 1) professional liability insurance providing coverage to the member has lapsed or is not in effect, or 2) the member acquires professional liability coverage as defined by this rule.

All certifications not received by April 1 of the current calendar year shall be considered delinquent. The Secretary Director of Admissions shall send written notice, by certified mail, to each member then delinquent in the reporting of professional liability insurance status, which notice shall be addressed to such member at his or her last reported address, and shall notify such member of such delinquency. All members who shall fail to provide the certification within 30 days thereafter shall be reported to the Supreme Court by the Secretary Director of Admissions, and the Supreme Court shall enter an order to show cause why such member shall not be

suspended from membership in this Association. The Supreme Court shall enter such an order as it may deem appropriate. If an order of suspension shall be entered, such party shall not practice law until restored to good standing.

. . . .

(C) Registration. All members not already registered with the ~~Secretary of this Association~~ Director of Admissions shall, within 60 days after being admitted to the practice of law by the Supreme Court of this State, register with the ~~Secretary of this Association~~ Director of Admissions by setting forth the member's full name, business address, and signature. All members shall promptly notify the ~~Secretary~~ Director of Admissions, in writing, of any change in such address.

(D) ~~Dues~~ Mandatory Membership Assessments.

(1) Payment of ~~Assessments~~ Dues. Each member shall pay mandatory membership assessments dues to this Association for each calendar year from January 1 to December 31 following, payable in advance on or before January 1 of each year, in such amounts as may be fixed by the Supreme Court pursuant to Neb. Ct. R. §§ 3-100(B), 3-301(E), and 3-1010(B). All ~~dues~~ such assessments shall be paid to the Treasurer of this Association and ~~shall constitute the funds for furthering the purposes of this Association, remitted to the Nebraska Supreme Court and shall be used for the administration and enforcement of the regulation of the practice of law by the Court.~~ Different classifications of ~~dues~~ assessments may be established for Active, Inactive, and Law Student members and for those members who have been admitted to the Bar of any State or other jurisdiction for a period of less than 5 years and for those members who are serving in the Armed Forces of the United States, while so serving. Members newly admitted to this Association shall receive a complimentary membership for the remainder of the current calendar year. ~~The Annual mandatory membership assessments dues~~ beginning calendar year 2009 2014 shall be as follows:

<u>Membership</u>	<u>§ 3-100(B)</u>	<u>§ 3-301(E)</u>	<u>§ 3-1010(B)</u>	
<u>Class</u>	<u>(Adm.)</u>	<u>(Discipline)</u>	<u>(UPL)</u>	<u>Total</u>
<u>Regular Active*</u>	<u>\$25.00</u>	<u>\$60.00</u>	<u>\$13.00</u>	<u>\$98.00</u>
<u>Junior Active**</u>	<u>\$25.00</u>	<u>\$60.00</u>	<u>\$13.00</u>	<u>\$98.00</u>
<u>Senior Active***</u>	<u>\$25.00</u>	<u>\$60.00</u>	<u>\$13.00</u>	<u>\$98.00</u>
<u>Judicial Active</u>	<u>\$25.00</u>	<u>\$60.00</u>	<u>\$13.00</u>	<u>\$98.00</u>
<u>Military Active****</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
<u>Regular Inactive</u>	<u>\$12.50</u>	<u>\$30.00</u>	<u>\$ 6.50</u>	<u>\$49.00</u>
<u>Emeritus Inactive</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>

\* (Members who have been admitted to the Bar of any State or other jurisdiction for more than 4 calendar years following the calendar year of admission.)

\*\* (Members who have been admitted to the Bar of any State or other jurisdiction for 4 or fewer calendar years following the calendar year of admission.)

\*\*\* (Members 75 years of age or older during the assessments year being billed.)

\*\*\*\* (A member actively engaged in the Armed Forces of the United States at the beginning of any calendar year shall be exempt from payment of assessments for such year upon submitting to the Director of Admissions, prior to the date of delinquency provided for in this Article, satisfactory proof that he or she is so engaged; upon receipt of such proof, the Director of Admissions shall issue a membership card to the member under the classification held by the member prior to his or her induction in the service and shall cause the records of this Association to show that such card was issued without payment of dues.)

<u>Active</u> <u>(Members who have been admitted to the Bar of any State or other jurisdiction for more than 4 calendar years following the calendar year of admission.)</u>	<u>\$275</u>
<u>Junior Active</u> <u>(Members who have been admitted to the bar of any State or other jurisdiction for 4 or fewer calendar years following the calendar year of admission.)</u>	<u>\$160</u>

Senior Active (Members 75 years of age or older during the dues-year being billed.)	\$ 70
Inactive	\$ 65
Military (A member actively engaged in the Armed Forces of the United States at the beginning of any calendar year shall be exempt from payment of dues for such year upon submitting to the Secretary, prior to the date of delinquency provided for in this Article, satisfactory proof that he or she is so engaged; upon receipt of such proof, the Secretary shall issue a membership card to the member under the classification held by the member prior to his or her induction in the service and shall cause the records of this Association to show that such card was issued without payment of dues.)	\$ 0
Emeritus	\$ 0

Effective January 1, 1999, and each year thereafter, a (2) A late fee of \$25 shall be assessed each Active or Inactive member whose dues mandatory assessments are received after January 1, a late fee of \$50 shall be assessed on dues mandatory assessments received on or after February 1, and a late fee of \$75 shall be assessed on dues mandatory assessments received on or after March 1.

(3) Funds collected by mandatory assessments pursuant to Neb. Ct. R. §§ 3-100(B) and 3-1010(B) shall be used by the Nebraska Supreme Court's Director of Admissions and Counsel on Unauthorized Practice of Law for regulatory management and oversight as required by the Court under its constitutional and inherent authority.

(2) Lobbying and Related Activities:

(a) This Association may use dues to analyze and disseminate to its members information on proposed or pending legislative proposals.

~~(b) All lobbying activities shall be subject to the following restrictions: The annual dues notice shall offer the members of the Bar an opportunity to direct that the stated amount of their dues intended for lobbying activities be placed instead in a restricted account. Funds from this account shall be budgeted by the Executive Council for activities which will promote the administration of justice or improvements of the legal system. The established budget for lobbying activities shall be reduced by the amount that is directed to the restricted account.~~

(E) Delinquency and Reinstatement. All ~~dues and mandatory membership~~ assessments not paid by April 1 of the current calendar year shall be considered delinquent; and the Secretary Director of Admissions shall send written notice, by certified mail, to each member then delinquent in the payment of his or her ~~dues and~~ assessments, which notice shall be addressed to such member at his or her last reported address, and shall notify such member of such delinquency. All members who shall fail to pay delinquent ~~dues and~~ assessments within 30 days thereafter shall be reported to the Supreme Court by the Secretary Director of Admissions, and the Supreme Court shall enter an order to show cause why such member shall not be suspended from membership in this Association. The Supreme Court shall, after hearing thereon, enter such an order as it may deem appropriate. If an order of suspension shall be entered, such party shall not practice law until restored to good standing. Whenever a member suspended for nonpayment of ~~dues and/or mandatory membership~~ assessments shall make payment of all arrears, and shall satisfy the Supreme Court of his or her qualification to then return to the active practice of law, such member shall be entitled to reinstatement upon request. The Secretary Director of Admissions shall keep a complete record of all suspensions and reinstatements. No person, while his or her membership is suspended, shall be entitled to exercise or receive any of the privileges of membership in this Association.

(F) Suspension or Disbarment. Any member who shall be suspended or disbarred from the practice of law by the Supreme

Court shall, during the period of such suspension or disbarment, be likewise suspended or barred from membership in this Association. On reinstatement to practice by the Supreme Court, such party shall, on written request and upon payment of the requisite fees and/or mandatory assessments, be restored to membership in this Association.

(G) Fees. Nothing herein contained shall be construed to limit the power of this Association, or of any of its sections or committees, to assess voluntary registration fees or attendance fees for meetings, institutes, or continuing legal education sessions as may be approved or determined from time to time by the House of Delegates or the Executive Council.

(H) Resignation. Any member may resign either active or inactive membership in this Association by tendering his or her written resignation to the Clerk of the Supreme Court of Nebraska on a form to be provided. This form shall include an affidavit to be completed by the member seeking to resign, stating that the member has not been suspended or disbarred in any other state or by any court; that the member has not voluntarily surrendered his or her license to practice law in any other state or to any court in connection with any investigation or disciplinary proceeding against the member; that to the member's knowledge he or she is not then under investigation, nor has a complaint or charges pending against him or her with reference to any alleged violation of professional responsibilities as a lawyer; and that the member agrees to be subject to the jurisdiction of the Supreme Court for a period of 3 years from the date his or her resignation is accepted for the purpose of disciplinary proceedings for any alleged violation of his or her professional responsibilities as a lawyer. During this 3-year period, the acceptance of his or her resignation may be set aside by the Supreme Court upon application filed in the Supreme Court by the Counsel for Discipline. If the affidavit is completed, the Supreme Court may accept the resignation, provided the resigning member's ~~dues~~ mandatory membership assessments are not delinquent, or may accept it upon payment of any such delinquent ~~dues~~ assessments, unless the member

seeking to resign has been suspended for the nonpayment of ~~dues~~ assessments as provided for in § 3-803(E), in which event the submitted resignation shall not be acted upon until the member seeking resignation has been reinstated as provided for in said section. In the event the affidavit is not fully completed, or any exception is taken to it, the tendered resignation shall be rejected. The Clerk shall keep a complete record of all requests for resignation and all resignations and shall report to the Secretary Director of Admissions the names and addresses of members whose resignations have been accepted by the Supreme Court.

(I) Reinstatement Following Resignation. Whenever a former member of this Association who resigned is readmitted to the practice of law in Nebraska by the Supreme Court, the member shall pay ~~dues~~ mandatory membership assessments for the year in which he or she is readmitted and be reinstated as a member of this Association.

(J) Voluntary Dues for Lobbying and Related Activities.

This Association may establish, collect, and use voluntary membership dues to analyze and disseminate to its members information on proposed or pending legislative proposals and any other nonregulatory activity intended to improve the quality of legal services to the public and promote the purposes of the Association as set forth in § 3-802.

**§ 3-804. Officers.**

. . . .

(G) Duties and Powers.

. . . .

(5) The Secretary shall be the custodian of the records and archives of this Association; ~~shall maintain the membership and all other records of this Association;~~ shall report the minutes of all meetings of this Association, the Executive Council, and the House of Delegates; and shall perform such other duties and responsibilities as may be provided by the bylaws and these rules.

(6) The Treasurer shall be the custodian of and shall supervise the collection and disbursement of all funds and properties of this Association, shall disburse the funds of this Association as provided in §§ 3-803(D) and 3-809, and shall have such other duties and responsibilities as may be provided by the bylaws and these rules.

(7) The Executive Director shall have such responsibilities and perform such duties as shall be delegated to him or her by the Nebraska Supreme Court, Executive Council, and the House of Delegates and shall perform such other duties and responsibilities as may be provided by the bylaws.

. . . .

**§ 3-805. House of delegates.**

(A) Duties and Powers. Except as otherwise provided by the Nebraska Supreme Court, ~~The~~ House of Delegates shall be the governing body of this Association; shall exercise overall jurisdiction over the affairs of this Association; shall determine and implement the policies and objectives of this Association; shall, consistent with these rules and the purposes of this Association, prepare, adopt, and amend bylaws for the government and operation of this Association, including the provisions for an annual meeting of this Association; and shall perform such other functions as are provided by these rules and the bylaws.

. . . .

(H) Personnel and Publications. Except as otherwise provided by the Nebraska Supreme Court and these rules, ~~The~~ House of Delegates shall have the power and the duty to fully administer this Article, including the power to employ necessary personnel and to establish the policies of this Association relating to official publications thereof.

. . . .

**§ 3-808. Meetings.**

(A) Annual Meeting. This Association ~~shall~~ may have one regular meeting annually at a time and place to be fixed by the

Executive Council. Each member of this Association shall be notified thereof by the Secretary by mail.

. . . .

~~(D) Emergency Meetings. In case of extreme emergency, the Executive Council, with the approval of the Supreme Court, may dispense with the calling of the Annual Meeting, but in such event shall call, in lieu thereof, a special session of the House of Delegates. In the case of extreme emergency, the Executive Council may call a special meeting, in such manner as may be determined by such Council, of all persons licensed to practice law in Nebraska.~~

**§ 3-809. Budget and audit.**

(A) Budget Preparation and Approval. The Budget and Planning Committee of this Association, consisting of not more than 13 members, shall study the income and expenses of this Association, based on its collection and expenditure of its annual voluntary dues, and shall prepare and submit to the Executive Council a proposed budget for each fiscal year of this Association. The Executive Council shall, upon receipt of such proposed budget, pass upon the same, and shall thereupon prepare and submit an annual budget of this Association's receipts and expenditures to the House of Delegates for its consideration and approval. Such proposed budget shall not be effective until 30 days after it shall be approved by a majority vote of the House of Delegates at a meeting for which at least 30 days' notice, including a copy of the proposed budget, has been given. The House of Delegates by majority vote thereof may amend or modify the proposed budget prior to its final adoption.

. . . .

(D) Circulation of Budget and Audit. The Executive Council, prior to the Annual Meeting of this Association, ~~shall file with the Clerk of the Supreme Court and~~ shall cause to be distributed to the voluntary members of this Association a copy of the current annual budget, the proposed budget for the succeeding year, and an annual statement showing a balance sheet and operating statement for the last preceding fiscal year.

. . . .

**§ 3-811. Bylaws.**

Suitable bylaws, not inconsistent with these rules, shall be adopted by the House of Delegates and shall be amended as necessary to reflect all Supreme Court amendments to these rules.

. . . .

**§ 3-813. Enabling rules.**

. . . .

(B) Effective Date. These rules shall become effective on January 1, ~~1971~~ 2014.

. . . .

**§ 3-814. Filing bylaws and rules.**

The Nebraska State Bar Association shall at all times keep on file with the Clerk of the Nebraska Supreme Court and Court of Appeals a current copy of its bylaws and all rules under which its House of Delegates, Executive Council, and various committees and sections operate.

**CHAPTER 3**

**ATTORNEYS AND THE PRACTICE OF LAW**

**ARTICLE 9**

**TRUST FUND REQUIREMENTS FOR LAWYERS**

. . . .

**§ 3-905. Trust account affidavit rules.**

. . . .

(E) Until otherwise directed by the Supreme Court, the affidavits and any other information required by § 3-905 shall be collected and maintained by the Bar Association on behalf of the Nebraska Supreme Court.

. . . .

**CHAPTER 3**  
**ATTORNEYS AND THE PRACTICE OF LAW**  
**ARTICLE 10**  
**UNAUTHORIZED PRACTICE OF LAW**

. . . .

**§ 3-1010. Jurisdiction.**

(A) Except as otherwise provided by § 3-1012(B), the Supreme Court, in the exercise of its inherent jurisdiction to define the practice of law and to prohibit the unauthorized practice of law within the State of Nebraska, adopts the following procedures, which shall govern proceedings under these rules concerning the unauthorized practice of law (UPL).

(B) Every attorney admitted to practice in the State of Nebraska shall pay a UPL assessment for each calendar year from January 1 to December 31, payable in advance on or before January 1 of each year, in such amount as may be fixed by the Court. The first UPL assessment shall be due on or before January 1, 2014. In accordance with Neb. Ct. R. § 3-803(D), such assessment shall be paid to the Treasurer of the Nebraska State Bar Association and shall be used to defray the costs of the administration and enforcement of the unauthorized practice of law as established by these rules. Different classifications of UPL assessments may be established for Active Jr., Active Sr., Active, Inactive, Military, and Emeritus members as those membership classes are defined in Neb. Ct. R. § 3-803. Members newly admitted to the practice of law in the State of Nebraska shall not pay a UPL assessment for the remainder of the calendar year in which they are admitted.

(C) Members who fail to pay the UPL assessment shall be subject to suspension from the practice of law as provided in Neb. Ct. R. § 3-803(E).

**§ 3-1011. Commission; creation.**

. . . .

(C) The Chief Justice shall appoint one member to chair the Commission and one member as the secretary of the Commission.

. . . .

**§ 3-1012. Commission; jurisdiction and duties.**

. . . .

~~(E) The Supreme Court hereby appoints the Executive Director of the Nebraska State Bar Association as Secretary of the Commission.~~

**§ 3-1013. Counsel; appointment and duties.**

(A) There shall be a Counsel on Unauthorized Practice of Law (CUPL), who shall be a member of the Nebraska State Bar Association.

(B) The CUPL shall be an employee of the Nebraska Supreme Court State Bar Association, which shall fund the operations of the office of the CUPL from the mandatory Supreme Court assessment established pursuant to § 3-1010(B).

(C) The CUPL shall perform for the Nebraska Supreme Court and the Commission all duties as required by these rules.

(D) The CUPL shall investigate all matters within the jurisdiction of the Commission in accordance with procedures adopted by the Commission and approved by the Supreme Court and shall perform the following duties:

(1) Maintain records of all matters coming within the jurisdiction of the Commission.

(2) Secure facilities for the administration of proceedings under these rules and receive and file all requests for investigation and complaints concerning matters within the jurisdiction of the Commission.

(3) Employ such staff, including investigative and clerical personnel, subject to the approval of the Supreme Court

~~Commission~~, as may be necessary to carry out the duties of the office.

(4) Perform such other duties as ~~the Commission or the~~ Supreme Court or the Commission may require.

. . . .

**NEBRASKA COMMISSION ON UNAUTHORIZED  
PRACTICE OF LAW  
ADMINISTRATIVE RULES, REGULATIONS,  
AND PROCEDURES**

. . . .

**III. Officers.**

**a. Chairperson.** The Chief Justice of the Supreme Court shall annually designate a chairperson from among the Commission members. Neb. Ct. R. § 3-1011(C).

**b. Vice Chairperson and Other Officers.** The Commission shall elect a vice chairperson each year, and such other officers as it may deem necessary to carry out the purposes of the Commission. Neb. Ct. R. § 3-1011(E).

**c. Secretary.** The Secretary of the Commission ~~shall be the custodian of all records of the Commission and shall keep minutes of all meetings held by the Commission, or its designated committees or panels. All such records and minutes shall be kept at the offices of the~~ Counsel on the Unauthorized Practice of Law, who shall be the custodian of such records NSBA. Neb. Ct. R. § 3-1012(E)13.

. . . .

**VI. Administration of Commission.**

**a. Counsel on Unauthorized Practice of Law.** Neb. Ct. R. § 3-1013.

**i.** The Counsel on Unauthorized Practice of Law (CUPL) will shall be hired by the ~~Executive Director of the NSBA~~ Nebraska Supreme Court and shall be an employee of the NSBA Court. The NSBA Court shall provide to the CUPL any

additional staff support as ~~designated by the Executive Director~~ approved by the Court. Neb. Ct. R. § 3-1013(BD)(3).

**ii.** The CUPL shall not be entitled to a vote on Commission matters.

**iii.** The CUPL shall be responsible for the duties prescribed in the Court Rules, Neb. Ct. R. § 3-1013, and other duties as assigned by the Supreme Court; or the Commission, ~~or Executive Director of the NSBA~~.

**iv.** The CUPL shall send out notices of meetings of the Commission and prepare the preliminary agenda for each meeting.

**b. Budget.** ~~The Executive Director of the NSBA and the CUPL, with the input of the Commission, shall prepare an annual budget for the performance of the Commission's activities. The Commission's budget will be part of the full NSBA budget and will be subject to the same process for approval.~~ NSBA The Nebraska Supreme Court shall pay, from the UPL assessment mandated by Neb. Ct. R. §§ 3-1010(B) and 3-803(D), all expenses reasonably and necessarily incurred by the Commission pursuant to the budget and the expense policy of the NSBA. Members of the Commission shall be entitled to reimbursement for reasonable expenses incurred in the performance of their official duties.

**c. Letterhead.** Use of Commission letterhead shall be limited to official business of the Commission and specifically shall not be used in connection with any political campaign or to support or oppose any public issue, or for personal or charitable purposes.

. . . .

## VIII. Advisory Opinions.

. . . .

**g. Publication of Advisory Opinions.** The Commission may arrange for the publication of advisory opinions in the Nebraska Lawyer magazine, on the NSBA Web site, on the Nebraska Supreme Court Web site, or elsewhere as it deems

appropriate. Opinions so published shall not, insofar as practicable, identify the party or parties making the inquiry, the complainant, or the respondent without the written permission of the party or parties making the request.

. . . .

## **X. Investigation.**

The complainant and the respondent may be interviewed, and such other and further review or investigation may be conducted as is deemed appropriate. The complainant may submit additional information. During the course of the investigation, the CUPL and/or the Commission may use its power, as provided in the Court Rules, to subpoena witnesses, compel production of documentary evidence, swear witnesses, take testimony, and cause transcripts to be made. Neb. Ct. R. § 3-1014(B) through (D).

**a. Methods of Investigation.** The CUPL may use such methods and means of conducting the investigation as the Commission shall deem appropriate, including written correspondence, electronic correspondence, telephone calls, teleconferences, personal meetings, consultation with law enforcement and government officials, hiring outside investigators, online research, or other legal organizations, ~~and any other NSBA resources~~. All communications shall strictly comply with the Court Rules regarding confidentiality; Neb. Ct. R. § 3-1020(C) through (G); however, CUPL may disclose basic information that is essential to the conduct of the investigation.

. . . .

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